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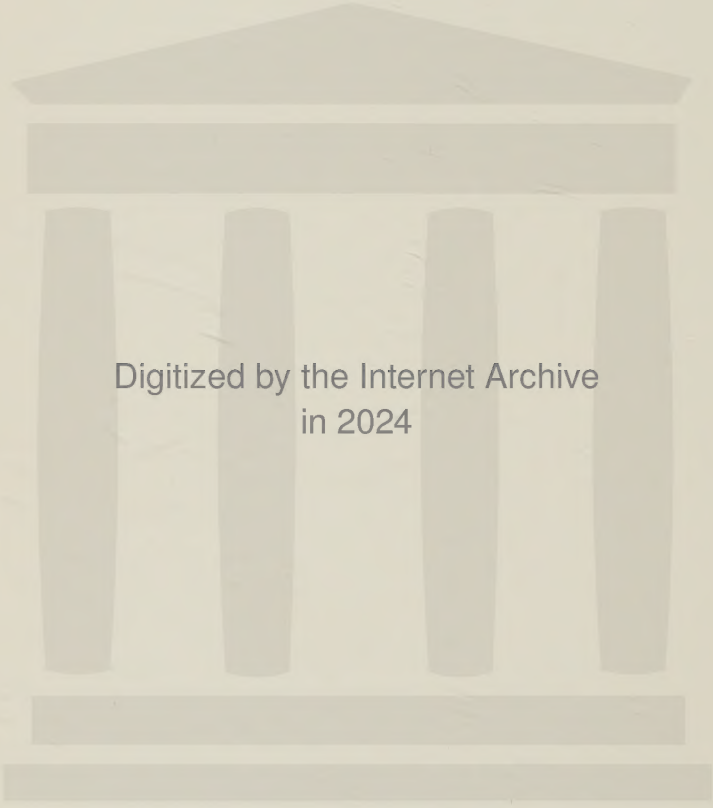

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THE LAW REPORTS

7 Appeal Cases

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THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ALSO

PEERAGE CASES.

EDITOR OF HOUSE OF LORDS REPORTS—J. R. BULWER, Q.C.

REPORTERS.

House of Lords—English and Irish Appeals and Peerages.	J. M. MOORSOM,	*Barrister-at-Law.*
House of Lords—Scotch and Divorce Appeals and Scotch Peerage Cases . . .	GERALD J. WHEELER,	*Barrister-at-Law.*
Privy Council Appeals . .	HERBERT COWELL,	*Barrister-at-Law.*

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ERRATA.

Page	*Line*	
63	10	*for* the words "If what he did," *read* "If he did, that acceptance."
263	29	*for* "Acts," *read* "Act."
330, n.	(1)	*for* "Law Rep. 17 Eq. 320," *read* "Law Rep. 10 Eq. 267; 6 Ch. 597."
392	30	*for* "bills" *read* "securities."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

WILLIAM MULLINS . . . . . APPELLANT;

AND

THE TREASURER OF THE COUNTY OF SURREY . . . . . } RESPONDENT.

H. L. (E.)
1881
Nov. 21.

Prison Act, 1877 (40 & 41 *Vict. c.* 21), *ss.* 4, 57—*Prisoner—Maintenance of Prisoners—Committal to Prison—Expenses of conveying to Prison.*

The expenses of conveying to prison persons who are committed to prison either for punishment or to take their trial and are unable to pay those expenses are "expenses incurred in respect of the maintenance of prisoners," within ss. 4 and 57 of the Prison Act 1877 (40 & 41 Vict. c. 21), and those sections transfer the liability for such expenses from county rates to moneys provided by Parliament.

APPEAL from a judgment of the Court of Appeal (1).

On the 12th of August 1879 a woman was convicted of being

(1) 6 Q. B. D. 156.

H. L. (E.) 1881 MULLINS v. TREASURER OF COUNTY OF SURREY.

drunk and disorderly by a metropolitan police magistrate sitting at Lambeth in Surrey, and adjudged to be imprisoned in the Westminster prison in Middlesex. By a warrant of commitment in the form P 1 in the schedule to 11 & 12 Vict. c. 43 the magistrate commanded the appellant Mullins, a metropolitan police constable, to convey the woman to the prison and deliver her to the keeper, which the constable did.

On the same day and sitting at the same place the magistrate committed a man to take his trial for felony, and by a warrant of commitment in the form T 1 in the schedule to 11 & 12 Vict. c. 42 commanded the same constable to convey him to Clerkenwell prison in Middlesex and deliver him to the keeper, which the constable did. Neither of the persons committed had at any time goods or money sufficient to bear the charges of themselves or the constable. At the request of the constable the magistrate ascertained the sum to be paid to the constable for so conveying the persons committed to be 1*s.* 6*d.* in each case, and made two orders upon the respondent as treasurer of the county of Surrey to pay those two sums to the constable; the order in the first case being in the form provided by 27 Geo. 2 c. 3 and in the second being to the like effect as the form T 2 in the schedule to 11 & 12 Vict. c. 42 (s. 26). The respondent who had then as treasurer sufficient money out of the county rate refused to pay either of the two sums. The power of a metropolitan magistrate to order the expenses to be paid to a constable was decided in *Leverick* v. *Mercer* (1). The constable having brought an action against the treasurer to recover the two sums, the above facts were stated by consent in a special case for the opinion of the Court under Order XXXIV. r. 1 of the Rules of the Supreme Court.

The questions for the Court are stated in Lord Blackburn's judgment.

The Queen's Bench Division (Lush and Manisty JJ.) gave judgment for the Plaintiff (2). The Court of Appeal (Lord Selborne L.C., Baggallay and Brett L.JJ.) reversed this decision and gave judgment for the defendant on the ground that the expenses in question were under the Prison Act 1877 (40 & 41

(1) 14 Q. B. 759. (2) 5 Q. B. D. 170.

Vict. c. 21) ss. 4, 57 to be defrayed out of moneys provided by Parliament (1).

From this judgment the plaintiff appealed.

Nov. 8, 11. Sir *H. Giffard* Q.C. and *Poland* (*Danckwerts* with them) for the appellant:—

The expenses in question are not included in the expression "the maintenance of a prisoner," in the Prison Act 1877 s. 57. Before the Act such expenses were regulated by 27 Geo. 2 c. 3 and 11 & 12 Vict. c. 42, and those Acts are not repealed. "Period of his committal" in s. 57 means the period of his delivery to the gaoler. "Commitment" would have been used if the period meant was that when he was committed by the magistrate.

[LORD BLACKBURN referred to the corresponding section of the Prisons (Scotland) Act 1877 (40 & 41 Vict. c. 53) s. 70, where the words are "period when the order for his committal to prison is made."]

To bring the expenses within sect. 57 they must before the Act have been "payable by a prison authority" (as defined by the Prison Act 1865 (28 & 29 Vict. c. 126) s. 5) as such authority, and these expenses were not. They are not in their nature prison expenses but police expenses and payable out of a police fund though by the county. The proviso in sect. 57 was inserted

(1) 40 & 41 Vict. c. 21, s. 4: "On and after the commencement of this Act all expenses incurred in respect of the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament."

Sect. 57: "A 'prisoner' for the purposes of this Act means any person committed to prison on remand or for trial, safe custody, punishment, or otherwise, and 'the maintenance of a prisoner' includes all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would if this Act had not passed have been payable by a prison authority, with this proviso, that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed."

Sect. 61: In this Act the expressions "prison authorities . . . . shall . . . . have the same meaning in relation to any prison as they have in the Prison Act 1865, and expressions defined in that Act have the same meaning also in this Act."

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by way of precaution only. As to the proper construction of a statute with a general provision and an exception see per Jessel M.R. in *Fryer* v. *Morland* (1). No good reason can exist for relieving other counties and not relieving Middlesex.

[3 Jac. 1 c. 10; 4 Geo. 4 c. 64; 28 & 29 Vict. c. 126 ss. 5, 8, 63; 40 & 41 Vict. c. 21 ss. 5, 8, were also referred to.]

The argument of Sir *F. Herschell* S.G. (*E. Baggallay* with him) for the respondent sufficiently appears from the judgments.

Poland replied.

The House took time to consider.

Nov. 24, 1881. LORD BLACKBURN:—

My Lords, it appears by this case that a woman was summarily convicted before a magistrate sitting at Lambeth in the county of Surrey of an offence committed in the county of Surrey, and sentenced to imprisonment. Before the passing of the Prison Act 1877 she would have been committed to a Surrey prison, but owing to directions given by the Secretary of State under the authority of the Prison Act 1877 she was committed by the magistrate's warrant to the prison at Westminster in Middlesex. A man was also committed by the magistrate sitting at Lambeth in the county of Surrey to take his trial for a felony committed in the county of Surrey. In this case also the prisoner before the Prison Act 1877 would have been committed to a Surrey prison, but owing to directions given by the Secretary of State under the authority of the Prison Act 1877 the warrant was made out committing him to the prison at Clerkenwell in the county of Middlesex. The constable who in obedience to the respective warrants conveyed the two persons to prison, incurred expenses (ascertained in each case to be 1*s.* 6*d.*); those expenses were probably in this case not greater, perhaps less, than would have been incurred in conveying the persons committed to a Surrey gaol, but they are not the same.

The questions in the case are whether the ultimate liability to repay to the constable these sums remains as it was before the

(1) 3 Ch. D. 686.

Prison Act 1877, that is whether it is to be borne by the treasurer of the county of Surrey out of the county rates, or whether it is by that Act to be defrayed out of moneys to be provided by Parliament. Though the individual sums are very small, the aggregate of all such expenses throughout England amounts to a very large sum, so that the question is one of importance in a pecuniary point of view.

The answer to it depends on the true construction of the Prison Act 1877; but to understand that Act it is necessary to some extent to consider what was the state of the law before it passed, and how far it altered it.

First as to the then existing law as to the costs of conveying the malefactor to prison. The case stated one instance of a person summarily convicted and committed to prison under a warrant in order to undergo her sentence and another of a person committed for trial, in case there should be any difference as regards the effect of the Prison Act of 1877 in the two cases, but there is none.

The responsibility of the gaoler does not commence till he receives the prisoner into his custody; the obligation to convey him to prison and keep him whilst so conveying him, at common law, lay upon the vill or place which furnished the constables or other officers who were to obey the justice. Lord Hale says (1) "The charges of sending malefactors to gaol by the common law is to be borne by the vill where they are apprehended: 3 Edw. 3 Coron. 328; 4 Edw. 3 c. 10." He does not state, nor does either the passage in Fitzherbert's Graunde Abridgement or the statute cited by him shew, nor have I been able to discover, by what machinery if any the constable who in the first instance was at the charges was to be reimbursed by the vill. "But now," he proceeds, "by the statute of 3 Jac. 1 c. 10 the charge is to be borne by the prisoner, if he hath wherewith, the same to be levied by the warrant of the justices of the peace; and if he hath not wherewith, then the charge to be borne by the parish, township, or tithing where the offender is apprehended, by a tax or rate to be made as by the said Act is prescribed." Since Lord Hale's time, by 27 Geo. 2 c. 3 the part of the statute 3 Jac. 1 c. 10

(1) 2 Hale, P. C. 96.

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which prescribed the making of a rate for the repayment is repealed, and in lieu of it it is enacted that when any person not having wherewithal is committed by warrant from any justice of the peace, then "on application by the constable or other officer who conveyed him to any justice of the same county or place" the justice is to ascertain the reasonable expenses of such constable or other officer, and "by warrant under his hand and seal order the treasurer of the county or place to pay the same, which the said treasurer is hereby required to do as soon as he receives such warrant, and any sum so paid shall be allowed in his accounts." By sect. 4 there is a proviso preventing the making any such order on the treasurer of the county of Middlesex; in that county the order is to be made on the overseers of the parish where the prisoner was apprehended. Why this distinction was made does not appear, but it still subsists.

There has not been any further legislation as to the expenses of conveying malefactors to gaol, where the prisoner was convicted. The 11 & 12 Vict. c. 42 in sect. 26 provides for the payment of conveying to gaol prisoners committed for trial. By that section the order is to be made upon the treasurer of the county, riding, division, liberty, or place of exclusive jurisdiction wherein the offence is alleged in the said warrant to have been committed. This throws light on what is meant by the word "place" in 27 Geo. 2 c. 3. The county or place the justice for which commits to prison was before 11 & 12 Vict. c. 42 the county or place where the offence was alleged to have been committed, and the prisoner was brought in custody before the justice within that county or place. But under the provisions of 11 & 12 Vict. c. 42 s. 22 prisoners may be in some cases committed to the gaol of the county in which the offence was committed by a justice of a different county sitting in a different county, and it was probably to meet that case that sect. 26 was framed as it is. In the case now at the Bar the person sent to prison was arrested in the county at large and would before the Prison Act 1877 have been committed to the gaol of the county, and under such circumstances the effect of 27 Geo. 2 c. 3 and 11 & 12 Vict. c. 42 is identical. The 11 & 12 Vict. c. 42 s. 26 retains the exception as to Middlesex to be found in 27 Geo. 2.

As to the law of prisons it is not necessary to consider any legislation prior to the Prison Act 1865. That Act applied to all prisons in England to which justices of the peace commit malefactors, and was confined to those prisons. For the first time the words "prison authority" are used as designating the managing body that acted for the locality to which the prison belonged; the thing was old though the name was new. By the 5th section, as regards any prison belonging to any county or place in the nature of a county, which is the case with which we have now to deal, the prison authority was the justices in quarter sessions assembled. The patronage and management of the prison was given to the prison authority. The prison itself was to be provided by sect. 8 at the "expense of" the county or place for which it was the prison. And all expenses "incurred by a prison authority in carrying into effect" the Act are to be defrayed out of the rates of the district applicable to the maintenance of a prison, or out of any other property applicable to that purpose.

It is necessary to notice these provisions, and to observe that no expenses were literally payable by the prison authority. They were all to be at the expense of the locality for which the prison authority acted, and to be defrayed out of the rates of that locality, which formed a fund not belonging to the prison authority though under its management and control.

I do not think that there is any other provision of the law existing before the Prison Act 1877 which it is necessary to notice. That Act by sect. 5 transferred to the Secretary of State all the prisons and the furniture and effects in them, which had heretofore belonged to the localities for which a prison authority acted. Those prisons are not I think quite accurately spoken of in sect. 3 as belonging to the prison authority. It also transferred to the Secretary of State all the power and patronage in respect to those prisons which had before been exercised by the prison authorities. And by sects. 24 and 25 the Secretary of State has power to alter the prison to which the prisoner, whether committed for trial or under sentence, might be sent, thereby altering the amount of the expenses of sending him thither, and in fact, as already pointed out, that power has been exercised in this case.

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Lord Blackburn.

Such an alteration being made, it was reasonable to make an alteration in the incidence of the expenses, and the Legislature did frame a scheme for that purpose. The county members would have a natural bias to wish to relieve the county rates as much as possible, and therefore they would probably wish the scheme to be to begin the relief from the time when the magistrate made the order of committal. And they might urge in support of this that under this new Act the power of the Secretary of State then began; the Treasury authorities would have a natural bias to wish to throw as little as possible upon the funds to be provided by Parliament, and therefore probably would wish the scheme to be to begin the burthen on the public from the time when the prisoner was received in the gaol, the expenses between the committal and the receipt being borne by the county rate or the police rate or otherwise as before, and there are plausible grounds which might be put forward by each. But what a Court of law has to do is to ascertain the intention of the Legislature, and that I think can only be done by taking the words of the Act as it received the Royal Assent and saying What intention do those words express when used with reference to such a state of the existing law and making such a change in it? Sect. 4 must be read as if for "prisoner" and "maintenance of prisoner" were inserted the definition of those words in sect. 57; and so read it enacts that all expenses shall be defrayed out of funds to be provided by Parliament, if they are incurred in respect of the maintenance of those prisons to which the Act applies; and "all such necessary expenses incurred in respect of any persons committed to those prisons on remand, or for trial, safe custody, punishment, or otherwise, including all such necessary expenses incurred in respect of such a person for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would if this Act had not passed have been payable by a prison authority, with this proviso, that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed."

Prisoners were under a liability to pay under 3 Jac. 1 c. 10. I am not aware of any other liability which existed. The inference to be drawn from that is that it was supposed that but for the proviso the case would or at least might have been within the enactment, and so far that affords an argument for construing the enacting part if ambiguous in a sense which would prevent the proviso from being idle and unnecessary. And I may here notice an argument used that if the enacting part put an end to the liability of the county some provision ought to have been made for securing the constables their expenses, and I think that does afford an argument for construing the enacting part if ambiguous in a sense that would prevent the imputation on the Legislature of having taken away one remedy for the constables without giving them another. I think it need not be considered which of these arguments is the stronger, for I do not think the words of the enacting part are ambiguous.

The first question is what do the words "committed to prison" and "committal to prison" here mean? Lush J. thought that they meant "received into prison," and on that based his judgment. But I cannot agree with him. I think that the words, both in common parlance and in legal phraseology, mean when the order is made under which the person is to be kept in prison, and I can see nothing in the scheme of this Act to justify us in putting an unusual sense on the words, especially as the Act gives to the Secretary of State a new controlling power from the time of the making of that order. Then if the words "period of committal" are to be understood as meaning from the time of the making out of the order of committal, it seems to me clear that the expenses incurred in carrying the committed prisoner from the magistrate's office, where he was then in confinement, to the prison, fall within the words "removal from one place of confinement to another or otherwise." And the only remaining question is whether they are within the qualification of being such "as would if this Act had not passed have been payable by a prison authority."

This is the part of the enactment which has given me most difficulty. But as I have already observed no expenses were before the passing of the Prison Act 1877 in the literal sense of

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the words "payable by a prison authority." They were to be borne by the county or place to which the prison belonged and for which the prison authority acted, and paid out of a fund which was raised by the rates, which in the case of a county, and I should think in all cases, was under the control and management of the same body which was by the Act of 1865 made the prison authority in respect to prisons in that county or place. And I think that unless the words "payable by a prison authority" mean payable out of the fund under the management of a prison authority, from which prison expenses are defrayed, there were no expenses so payable by a prison authority, and the whole enactment would be inoperative. Construing them so, I think that the expenses payable out of the county rates which are under the control of the justices in quarter sessions, who are the prison authority, must be considered as paid by a prison authority. I attach no weight either one way or the other to the fact that the amount of these expenses was to be ascertained by a justice of the peace. When ascertained they were to be paid by the treasurer, who was the servant of the justices belonging to the county, out of the fund which was under the control of those justices, and those justices were after the Act of 1865 a prison authority. And I do not see that they were the less payable by the county which the justices represented, because they were not at liberty to disallow the payment made by the treasurer.

The parochial authorities of Middlesex might have made a case before Parliament for relieving them also from the payment of those expenses. If they did their claim was disregarded. But I cannot agree with Manisty J. that the fact that in Middlesex those expenses are paid out of the parochial fund, belonging to a body that had nothing to do with the prison and which can in no sense be said to be paid by a prison authority, shews that in other counties the payment, out of a fund belonging to the body which maintained the prison and which was under the control of the body which was made the prison authority, was not made by the prison authority.

I therefore agree with the construction of the Act come to by the Court of Appeal, and consequently in my opinion the appeal should be dismissed with costs.

LORD WATSON:—

My Lords, I also am of opinion that the judgment of the Court of Appeal ought to be affirmed.

In construing the 57th section of the Prison Act 1877 (40 & 41 Vict. c. 21) for the purposes of this case, the first question arising for consideration is this, whether the expression "committed to prison" refers to the granting of a warrant for the incarceration of the prisoner, or to the delivery of his person into the custody of the gaoler within the prison walls. Upon this point I cannot say that the able argument of the appellant's counsel raised any serious doubt in my miud. "Commitment" or "committal," for I take these words to be synonymous, express the act of the magistrate, who alone has power to commit to prison, whether pending further inquiry, for trial, or for punishment. His exercise of that power is complete whenever the warrant of commitment has been duly signed and delivered. With the safe conduct of the prisoner from the dock to the gaol, and his transfer there to the custody of the prison officials, the magistrate has nothing to do. I am accordingly of opinion that the leading words of enactment in sect. 57 are broad enough to cover all expenses lawfully incurred in respect of the safe conduct and conveyance of a prisoner from the time when the warrant of committal is issued until his death or discharge.

The decision of the case in my opinion comes to depend upon the just construction of these words in sect. 57, "as would if this Act had not passed have been payable by a prison authority." If it were established that the costs of conveying a prisoner from the dock to the gaol upon remand or summary conviction were not payable by a prison authority within the meaning of sect. 57, it appears to me that the Appellant would be entitled to have judgment given in his favour.

It is not in dispute that the term "prison authority" first became a nomen juris on the passing of the Prison Act 1865 (28 & 29 Vict. c. 126). By sect. 5, subs. 1 & 2, justices of the peace were constituted the prison authority in counties for the purposes of the Act, and by sect. 8 it was enacted that all expenses incurred by the prison authorities in carrying into effect the provisions of the Act should be defrayed out of any rate of

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the nature of a county rate leviable in the county and applicable to the maintenance of a prison, or out of any other property applicable to that purpose. Neither is it disputed that the costs to which the present action relates formed no part of the expenses of executing the Act of 1865, and were in no sense incurred or payable by a prison authority constituted under that Act. Before the passing of the Prison Act 1865 it had been enacted that these costs should be paid by the treasurer of the county—in all counties except Middlesex—upon the order of the justice or justices by whom the accused party had been committed.

Accordingly at and before the time when the Prison Act of 1877 became law matters stood in this position. The cost of conveying to prison a person committed on remand or for trial, was a charge upon the county funds or rate administered by the county justices. As I read the Act of 1865 the expenses incurred in its execution by the justices acting as the prison authority were made a charge upon the same fund. The Act of 1865 expressly provides that they "shall be defrayed" out of the county rate, and although in sect. 57 of the Prison Act 1877 these expenses are described as "payable by a prison authority," they were not in any strict sense payable by a prison authority under the Act of 1865, but were payable out of the county rates or funds levied and administered by the justices of the peace. The county prison authorities under the Act of 1865 had, quâ prison authorities, no statutory right to interfere with the county rates or funds; they had merely a right to demand that the expenses incurred by them in carrying out the Act should be defrayed by the justices as the legal administrators of the county fund.

I have come to the conclusion that the expression "a prison authority" in sect. 57 refers to and means the justices of the peace of the county, and not the justices acting in their capacity of prison authority for the county. In that clause the expenses with which it deals are first described as expenses "incurred in respect of a prisoner," that is, "incurred" by the new Prison Department of the State; but when reference is made to the state of things existing before the passing of the Act, they are described as expenses "payable" by a prison authority. If

it had been intended by means of these last words to limit "expenses" for the purposes of the clause to such as were necessary for carrying out the Act of 1865, the change of phraseology from "incurred" to "payable" is very singular. The whole costs from commitment until death or discharge of the prisoner were "payable" in the strictest sense of the word by the justices of the county: whereas the prison expenses after his actual incarceration, which were "incurred" by the justices as the prison authority under the Act of 1865, were certainly not "payable" by them in that capacity.

The considerations to which I have referred would not of themselves lead me to reject the appellant's arguments upon this part of the case. But they do not stand alone. The 61st section of the statute of 1877 enacts that "the expressions 'prison authorities,' 'justices in sessions assembled,' and 'visiting justices,' shall have the same meaning in relation to any prison as they have in the 'Prison Act 1865,' and expressions defined in that Act have the same meaning also in this Act." That enactment appears to me to have the practical effect of transferring so far as necessary all its definitions or interpretation clauses from the Act of 1865 to that of 1877. And the provision that "prison authorities" shall have the same meaning as in the Act of 1865, has in my opinion no other or further result than to import the definitions of a prison authority contained in sect. 5 of that Act into the "Prison Act 1877." I do not think it was intended to import not only that definition, but along with and as a necessary part of it all the rights and liabilities belonging or attaching to a prison authority under the Act of 1865. And, if I am right in holding that such is the true import and effect of sect. 61, it is beyond controversy that the costs sued for, which were formerly payable out of the county funds administered by the justices, must now be met by the Treasury.

I have not been able to derive any aid from the leading enactments of the statute apart from the terms of sects. 57 and 61, as indicating the intention of the Legislature in regard to this matter. They do not per se create any presumption that the Legislature intended to make these costs a charge upon the national purse; at least that inference does not appear to me to be more probable

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than the appellant's theory that nothing is transfered by the Act to the Home Secretary, except the prisons of the county and the maintenance of prisoners after they have been placed in the custody of the prison officials. Nor do I think that there is much weight in the argument derived from the terms of the proviso with which sect. 57 concludes. It belongs to a species of proviso which is introduced without necessity, and simply ob majorem cautelam, and in no way conflicts with either of the two constructions of the enacting words of the clause, for which the appellant and the respondent respectively contend, although the fact of its introduction is more easily explained on the assumption that the contention of the respondent is right.

LORD PENZANCE :—

My Lords, I am glad to find that your Lordships have arrived at the conclusion with respect to this case to which my own mind has been brought upon a full consideration of it, not without some doubt and hesitation. The question is really a very short one and depends not only substantially but in form upon the proper construction to be given to a single section of a single Act of Parliament. I shall therefore not trouble your Lordships at any length on the subject. I think a very short time will enable me to put before the House the reasons which have brought my mind to the conclusion that the judgment appealed from ought to be affirmed.

The Prison Act of 1877 was an Act for the purpose of transferring to the Secretary of State the government and management of the prisons of this country, which had before in the case of counties been under the management of the magistrates; and the 4th section says that "after the commencement of this Act all expenses incurred in respect of the maintenance of prisons" . . . . "and of the prisoners therein shall be defrayed out of moneys provided by Parliament." Then comes the question what is the meaning of the word "maintenance"? That is a technical word which has been used in the Act subject to a definition to be found in sect. 57, on which the whole question turns. Sect. 57 declares that "the maintenance of a prisoner" includes certain things. First there comes what I will call a descriptive category of the

matters which are included in the words "maintenance of a prisoner." "All such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison." Then follows what I will call a restrictive condition in these words: "As would if this Act had not passed have been payable by a prison authority." And thirdly there follows a proviso "that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed."

After the argument that has taken place at your Lordships' Bar I think it cannot be denied that this section presents some difficulty, because whichever construction you give to it, you to a certain extent, I will not say do violence to other portions of the section, but you do not give the natural meaning to every expression contained in it which would in the first instance arise to the mind on reading it.

The argument of the appellant proceeds on the supposition that "commitment to prison" does not mean the commitment by a magistrate, but means the actual transfer into the prison and reception in the prison of the prisoner. It is necessary for the appellant to place that construction upon the category with which the section starts, because undoubtedly otherwise the sum in question would fall within that category. The sum in question is an expense incurred after the committal by the magistrate and before the reception into prison. Whether it is "commitment" or "committal" appears to me to be indifferent, for I think they mean the same thing. But I think everyone would say that the natural and ordinary meaning of "commitment to prison" is the act of the magistrate in committing to prison, and therefore some violence is done as I think by the argument of the appellant to that portion of the section and to the word "commitment."

But he justifies that violence by the construction which he says is the necessary and proper construction of the following words,—those words which contain what I have called a restrictive condition. They are to be "such expenses as would if this Act had

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not passed have been payable by a prison authority." Now I confess that reading those words by themselves I should have been disposed to think that the Act meant payable by a prison authority as such. I think that would be the natural meaning of those words, and it is upon that view of the meaning of those words that the appellant's argument is founded. He does some violence therefore to the first portion of the section, but he founds his reasons for doing that violence to the first portion of the section on the proper construction of the second portion of the section.

The respondent says that "commitment to prison" means commitment in its ordinary sense, and certainly he does no violence to that portion of the section. And when he comes to deal with the next portion, namely the restrictive condition that they must be "such expenses as would if the Act had not passed have been payable by a prison authority," he says, "a prison authority,"—what is that? Turning to the definition clause in sect. 61 we find that the expression "prison authorities" and other expressions shall "have the same meaning in relation to any prison as they have in the Prison Act 1865." When we turn to the Prison Act of 1865 we find in sect. 5 that "the persons hereinafter named shall be prison authorities for the purposes of this Act," and then follows a list of the different people who are to constitute a prison authority according to the place in respect of which the Act is speaking. With regard to counties it says: "As respects any prison belonging to any county, except as hereinafter mentioned, or to any riding, division, hundred, or liberty of a county having a separate court of quarter sessions, the justices in quarter sessions assembled," are to be the "prison authority." If that definition of "prison authority" is read into the Act of 1877, the restrictive condition to which I have referred would run in these words: "Such expenses as would if this Act had not passed have been payable in a county by the justices in quarter sessions assembled."

The respondent says you have no right to go beyond that—that satisfies the whole of the words; you have got a definition of "prison authority" given you in this statute, and it says that that expression is to mean the same thing as it does in the Act of 1865; the Act of 1865 says as regards a county that it means

the justices in quarter sessions assembled, and therefore the whole scope and effect of this portion of the section is merely to say that an expense incurred in respect of a prisoner which is to be within this section must be such as would if the Act had not passed have been payable by the justices in quarter sessions assembled. In my opinion that construction does much less violence to the primâ facie aspect of the words contained in the section than that which the appellant has been forced to adopt; and therefore had the matter stood there alone my mind would have been driven to the conclusion that the respondent was right.

But then there remains the proviso, and I confess I am inclined to give more weight to that proviso than some of your Lordships have done. The proviso is "that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed." Now I quite agree that provisoes are constantly inserted in Acts of Parliament to protect particular interests ex majore cautelâ, and that you must not always expect to find that if the proviso had not been there an effect would have been produced contrary to or different from the effect that is produced by the proviso being there; in other words you must not always expect to find that the proviso was necessary. But in this case I cannot help thinking that the proviso has shed a light upon the meaning of the Legislature, because the person who drew this Act must have had before his mind in drawing that proviso the species of expense which is here in question: he must have had before him the expense of conveying a prisoner to prison, an expense which by previous statutes had been cast upon the prisoner himself in the first instance. Assuming this Act to have been draughted by a single individual and not to be the work of several hands, it would be impossible to suppose that the draughtsman would have put in that proviso, unless he had thought that the previous part of the section had been dealing with an expense of this character. There would have been no need for it, and not only would there have been no need, but there would have been almost an absurdity in putting in a proviso that nothing should in future prevent a

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prisoner paying the expense of his own conveyance to prison as he had done before, unless the previous part of the section had dealt with a matter of that character. Therefore I think the proviso does shed a light upon the previous part of the section, and fortifies the arguments which have been urged in other respects in support of the respondent's case.

There is only one other matter to which I desire to call attention, and that is a consideration which was urged by the Solicitor-General. I think it is a consideration well worthy of acceptance. It turns, not upon any special and particular language used in the statute, but upon the general scope and effect of the Act as passed by the Legislature. The object of the Act was to transfer county prisons from the jurisdiction of the magistrate to that of the Secretary of State; and at the same time that it relieved the magistrates from all dealing with prisons and all control over them, it proposed in general terms undoubtedly to relieve the county from the expense of them. Now in this Act there is a provision enabling the Secretary of State to order a prisoner who has committed an offence in county A to be confined in a prison, not necessarily in county A, but in county B; and in this particular appeal one of the cases brought before the House for its determination is a case where an offence was committed in Surrey, and the prisoner was sent to a prison in Middlesex. It is obvious enough that in such a state of things if this expense falls upon the county, the county might be put to much greater charges than it would otherwise have been put to, that is to say than it would have been put to before the Act passed. Before the Act passed the county was responsible for its own prisoners, and had to pay the expense of its own prisoners being conveyed to jail. But it would seem unlikely that at the time when the Legislature was taking away the authority from the county magistrates, and at the time when it was by the same blow relieving them from the expense of prisons, the Legislature intended to cast a new burden upon the county rates in the manner which has been suggested.

I think that is a consideration which has some weight, and which adds something perhaps to the arguments which have been already urged, and which have received your Lordships'

sanction in favour of the respondent. I am therefore of opinion that this judgment ought to be affirmed. H. L. (E.) 1881 MULLINS v. TREASURER OF COUNTY OF SURREY.

Judgment affirmed; and appeal dismissed with costs.

Lords' Journals 24th Nov. 1881.

Solicitor for Appellant: *Solicitor to the Treasury.*
Solicitor for Respondent: *F. F. Smallpiece.*

[HOUSE OF LORDS.]

WILLIAM LAWRIE . . . . . APPELLANT; H. L. (E.) 1881 Nov. 29.

AND

GEORGE LEES . . . . . RESPONDENT.

Vendor and Purchaser—Sale of Leaseholds—Conditions of Sale—Specific Performance—Lunatic—Execution of Lease by Committee.

A leasehold public-house was sold subject to a condition that the production of the last receipt for rent paid should be taken as conclusive evidence of the due performance of the lessee's covenants or the waiver of any breaches up to the time of completion, whether the lessor should be cognizant of such breaches or not. The lease contained a covenant to use the premises for the business of a public-house only, and not to permit any other trade to be carried on on any part of the premises without the lessor's written consent. The particulars on which the contract of purchase was indorsed shewed that parts of the premises were underlet to persons who carried on other trades there. From the answers to objections to title it appeared that the lessors had received rent with knowledge of the underlettings, and the last receipt for rent was produced. Specific performance of the contract having been decreed and a reference as to title directed by an order which was not appealed from:—

Held (affirming the decision of the Court of Appeal) that whether the breach of covenant was or was not a continuing breach such as to render the purchaser liable to be ejected after the completion of the purchase, and whether this would or would not have furnished a valid reason for not decreeing specific performance, the vendor had made a good title in accordance with the contract which the purchaser was bound to accept, the decree for specific performance having been made and not appealed from.

By a lease expressed to be made between a lunatic by A. B. and C. D., his two committees, and other parties, the lunatic acting by his committees demised. The testimonium clause was "In witness whereof the said parties

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to these presents have hereunto set their hands and seals." A. B. signed his name against one seal and C. D. his against another; and the attestation clause was "signed, sealed, and delivered by A. B. and C. D. in the presence of &c.":—

Held (affirming the decision of the Court of Appeal) that the lease was well executed on behalf of the lunatic.

APPEAL from an order of the Court of Appeal (1).

On the 20th of February 1877 the appellant agreed by private treaty with the respondent for the purchase of a leasehold public-house and premises (comprising coach-houses, stables, and other buildings) called the 'White Bear' situate at Hampstead and the goodwill of the same for £850, paid £100 deposit and signed a memorandum indorsed on certain particulars and conditions of sale, which had been prepared for a sale by auction. The particulars shewed (as the fact was) that part of the premises were sub-let on a yearly tenancy to a coachbuilder, and another part to a flymaster.

The 4th condition was:—

"(4.) The vendor shall furnish to the purchaser, or his solicitor, an abstract of title, but shall not be required to produce the lessor's title, which shall be admitted by the purchaser, or any title prior to the date of the lease by which the premises are held, and which lease shall be taken to be well granted, and to be valid and effectual notwithstanding any superior or other title or evidence of title may be recited or referred to, or otherwise appear . . . and the production of the last receipt for rent paid shall be taken as conclusive evidence of the due and satisfactory performance of the lessee's covenants contained in the lease by which the premises are held, or the waiver of any breaches of the same covenants up to the time of the completion of the purchase, whether the lessor shall be cognizant of such breaches (if any) or not."

The last condition ran, "The property is presumed to be correctly described, but as the lease will be produced at the sale and the premises may be viewed no error misdescription or omission in the foregoing particulars shall annul the sale, and no compensation or equivalent shall be required for any such error misde-

(1) 14 Ch. D. 249.

scription or omission, and the purchaser shall be deemed to have bought with full notice of the contents of the lease sold and of the state of the property."

An abstract of title having been delivered, the lease shewn by the abstract as the root of the respondent's title was (as thereby appeared) an indenture of lease dated the 12th of December 1868 and expressed to be made between Sir Henry Meux a person of unsound mind so found by inquisition, by Lord Ernest Bruce and Viscount Malden the committees of his estate, and Sir D. C. Marjoribanks and R. Berridge (Sir Henry Meux Sir D. C. Marjoribanks and R. Berridge carrying on business as brewers in co-partnership under the style of Henry Meux & Co. and thereinafter called the lessors) of the one part, and the lessee of the other part. Whereby after reciting (as the fact was) that by an order of the Lords Justices dated the 26th day of April 1867 it was ordered that Lord Ernest Bruce and Viscount Malden as such committees should be at liberty, with the approbation of the Masters in Lunacy and in the name and on behalf of Sir Henry Meux, from time to time to concur in and execute all such deeds as the present lease (amongst others), and that the concurrence in and executing of the lease by Lord Ernest Bruce and Viscount Malden as such committees had been approved by the Masters in Lunacy, as appeared by the signature of one of the Masters in the margin: It was witnessed that the lessors (Sir Henry Meux acting by Lord Ernest Bruce and Viscount Malden as such committees) demised to the lessee the premises in question for a term at a rent; with a covenant by the lessee (inter alia) to keep open and use the 'White Bear' inn for the purposes of the trade or business of a licensed victualler according to the usual practice of publicans; and also during the term thereby granted to use the yards, coach-houses, stables, and other appurtenances to the said 'White Bear' inn as and for yards, coach-houses, stables, and appurtenances to the said 'White Bear' inn and in connection with and for the convenience of the business carried on therein, and not to carry on or permit or suffer to be carried on during the said term on any part of the premises thereby demised any trade or business whatsoever other than above-mentioned, without the special license and consent of the lessors first had and obtained

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in writing for that purpose; with the usual proviso for re-entry on non-performance of the covenants.

The testimonium clause ran thus: "In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

"Ernest (L.S.) Bruce.
"(L.S.) Malden."

(The seals and signatures of the other parties.)

"Signed, sealed, and delivered by the within-named Lord Ernest Bruce and Viscount Malden in the presence of" etc.

Sect. 3 of Sir H. Meux's Settled Estate Act 1863 was as follows:

"The Lord Chancellor may from time to time, so long as the said Sir Henry Meux and his estate shall continue to be subject to the jurisdiction in lunacy, order or direct to be done, permitted and suffered with respect to the business of the 'Horse-shoe' brewery, and the said partnership and any further partnership or partnerships therein, and the earnings, profits, and proceeds thereof, and any share of and interest in the same respectively, and the carrying on or winding-up of the said business, and the disposal of the said business, and of any real or personal estate belonging thereto or employed therein, or which may have belonged thereto or been employed therein, and otherwise in relation to the said business and the affairs and concerns thereof, all and whatsoever Sir Henry Meux, if of sound mind, might do, permit or suffer or concur in doing, permitting or suffering with respect to the same."

The purchaser raised two objections to the title, 1, that the lease was not duly executed by Sir H. Meux, and was consequently invalid; and, 2, that there had been a breach of the covenant set out above by the sub-lettings; that it was a continuing breach and not curable by license or waiver, and that the purchaser would be liable to be ejected after the completion. To the second objection the vendor answered on the 12th of March 1877 by referring to the 4th condition and undertaking to produce the last receipt for rent; and by stating that the sub-lettings and occupation of the premises had been with the full knowledge and

consent of the lessors whose solicitors were the solicitors of the vendor.

The purchaser on the 19th of March 1877 brought an action claiming to set aside the contract of purchase on grounds not now material; or in the alternative for rectification of the contract in certain particulars immaterial to the present report, and for specific performance if the vendor could make a good title. The vendor counter-claimed for specific performance.

On the 3rd of December 1878 the action came on for trial before Hall V.C. and by his order of that date it was ordered that so much of the purchaser's claim as sought to set aside the contract be dismissed, and specific performance was decreed, and inquiries were directed, 1, whether a good title could be made; and if so, 2, when it was first shewn that such good title could be made. This order was not appealed from. By the certificate of the Chief Clerk dated the 14th of May 1879 it was certified that a good title had not been shewn, and that therefore it had become unnecessary to proceed with the second inquiry.

The vendor having taken out a summons to vary the certificate, an order dated the 24th of July 1879 was made by Hall V.C. on the hearing of the summons, and on further consideration, by which order after stating that it appeared from the Chief Clerk's certificate that a good title had not been shewn to the premises, the counter-claim was dismissed with costs, the deposit ordered to be repaid, and the action dismissed. Hall V.C. based his decision solely on the ground that the execution of the lease was invalid (1).

The vendor having appealed against the order of the 24th of July 1879 the Court of Appeal (James, Baggallay, and Bramwell, L.JJ.) by an order of the 8th of April 1880 discharged the order of the 24th of July 1879 and ordered the Chief Clerk's certificate dated the 14th of May 1879 to be varied by finding that a good title was before the commencement of this action shewn by the vendor, and ordered that the purchaser should on or before the 8th of May 1880 pay to the vendor £750 (being the balance of his purchase-money) and £320 for fixtures &c., and that upon the purchaser paying to the vendor the sums

(1) 14 Ch. D. 253.

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of £750 and £320 and the amount of the valuation of the stock-in-trade, the vendor should execute a proper assignment of the premises to the purchaser to be settled by the Judge in case the parties differed (1).

From this order the purchaser appealed.

Nov. 22, 24, 29. *Horton Smith* Q.C. and *J. Beaumont* for the appellant:—

The lease was invalid because the Lord Chancellor or the Lords Justices (for there is no distinction) had no power under Sir H. Meux's Estate Act 1863 to make a prospective order: he must order "from time to time," sect. 3. The order of the Lords Justices of the 26th of April 1867 does not provide as it ought for the personal judgment and approval by the Lord Chancellor (or the Lords Justices) upon any lease to be granted, unless it is to be read as incorporating the Chancery practice, and that practice was not complied with: Elmer's Pract. in Lunacy (2), Lunacy Regulation Act 1853 s. 129, and Gen. Orders Nov. 7 1853 G.O. 54. This lease ought to have been submitted to and approved by the Lord Chancellor or the Lords Justices. The execution of the lease was bad. Lord E. Bruce and Lord Malden ought to have executed in the name of their principal. The attestation clause does not say they did, as it would if they had. One who has power by letter of attorney to make leases for years must execute in the name and style of his principal and not in his own name, and that must appear on the face of the deed: Bac. Abr. tit. Leases (3), citing the case of the King's Surveyor (4) and *Grenefield* v. *Strech* (5); *Combes' Case* (6); *Wills* v. *Back* (7); *Frontin* v. *Small* (8); *White* v. *Cuyler* (9). The fourth condition does not bind, for a condition does not bind where there is an untrue representation misleading a purchaser as to facts within the vendor's knowledge: *Broad* v. *Munton* (10). Notice is not equivalent to knowledge, and notice is nothing if it conflicts with the contract: *Van* v. *Corpe* (11);

(1) 14 Ch. D. 249, 256.
(2) Page 63, 6th Ed.
(3) I. 10.
(4) Moore, pl. 191.
(5) Dyer, 132.
(6) 9 Co. Rep. 74 b; 76 b; 77 a.
(7) 2 East, 142.
(8) 2 Ld. Raym. 1418; 2 Str. 705.
(9) 6 T. R. 176.
(10) 12 Ch. D. 131.
(11) 3 My. & K. 269.

Flight v. *Barton* (1). The particulars represent the lease to be good and the underlettings valid and lawful and as reducing the net rental; but in fact the underletting was a breach of covenant for which the lessors might re-enter. The terms of the lease and the covenant were not known till the abstract was delivered. Even if the fourth condition binds it does not meet the case, it is only directed to a defect in the superior title. It does not cure a defect shewn in the vendor's own title: *Smith* v. *Robinson* (2). Such a condition only cures breaches up to the date of the contract: *Howell* v. *Kightley* (3); *Bull* v. *Hutchens* (4). The breach of covenant is continuing, and the purchaser may be ejected the day after he completes; the covenant is not the same as in *Walrond* v. *Hawkins* (5). If the order is right in substance it is wrong in form; the purchase-money is ordered to be paid to the vendor, whereas it should be paid only on the concurrence of the mortgagees, who would only concur on being paid off, and the payment and execution of the conveyance should be simultaneous: Seton on Decrees (6).

Davey Q.C. and *Northmore Lawrence* for the respondent:—

It is too late to object to specific performance. The action was brought to rescind the contract which Hall V.C. refused to order, and the decree for specific performance was not appealed against. *Broad* v. *Munton* (7), *Van* v. *Corpe* (8), and *Flight* v. *Barton* (1) were cases on specific performance. The decree for specific performance is always a matter of discretion in the Court, and the appellant's argument ought to have been addressed to Hall V.C. upon the question of specific performance. No such question can now be raised as was raised in *Howell* v. *Kightley* (9), which moreover is a doubtful case, never overruled but never followed; but that was a wilful act which might cause a forfeiture. Perhaps that decision may be right on the ground that there is an implied con-

(1) 3 My. & K. 282.
(2) 13 Ch. D. 148.
(3) 21 Beav. 331; 8 De G. M. & G. 325; 25 L. J. (Ch.) 341, 868; 4 W. R. 477.
(4) 32 Beav. 615.
(5) Law Rep. 10 C. P. 342.
(6) Vol. ii. p. 1307, tit. Specific Performance, Form 11, 4th Ed.
(7) 12 Ch. D. 131.
(8) 3 My. & K. 269.
(9) 21 Beav. 331; 25 L. J. (Ch.) 341, 868.

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tract that a vendor will do nothing after the contract to invalidate it. *Bull* v. *Hutchens* (1) is undistinguishable from this case and goes further than we need. In fact there has been no continuing breach, and *Walrond* v. *Hawkins* (2) is really the same case as this; but if there has been a continuing breach it is covered by the fourth condition. The order of the Lords Justices is valid. If it were necessary to get a fresh consent each time a mortgage or lease is granted or a reassignment taken in this large brewery the costs would be enormous. The argument on this point was stopped below by James L.J. who said it was too clear; there were some points which it was not decent to argue. The execution of the lease was good. The cases relied on by the appellant are good law, but do not assist him. In the case of the King's Surveyor (3) the king was a party, but the surveyor executed in his own name: "Sigillum suum apposuit." So in *Frontin* v. *Small* (4). The form of the decree is right; but if wrong under Order XLI A of the Rules of the Supreme Court accidental errors may at any time be corrected by the Court without an appeal.

Horton Smith Q.C. in reply:—

The form of decree is wrong. Since *Margravine of Anspach* v. *Noel* (5), which settled the practice, the form always follows that precedent: Seton on Decrees (6). Only clerical errors can be altered without a rehearing: Daniell's Ch. Prac. (7). As to the real effect of *Howell* v. *Kightley* see Dart's Vend. and Pur. (8). To enforce the 4th condition would be inequitable and on a question of title part of a contract may be rejected if it is inequitable, even though the same questions have been raised on the hearing and a decree has been made: *Lesturgeon* v. *Martin* (9): *Curling* v. *Austin* (10); *Rhodes* v. *Ibbetson* (11); *Gaston* v. *Frankum* (12) *Parnett* v. *Baker*, per Malins V.C. (13); *Warren* v. *Richardson* (14).

(1) 32 Beav. 615.
(2) Law Rep. 10 C. P. 342.
(3) Moore, pl. 191.
(4) 1 Str. 705; 2 Ld. Raym. 1418.
(5) 1 Madd. 310, 317.
(6) Vol. ii. pp. 1303–1306, Forms 1, 2, 8, 11.
(7) Vol. ii. p. 925, 4th Ed.
(8) Vol. i. p. 169, 5th Ed.
(9) 3 My. & K. 255.
(10) 2 Dr. & Sm. 129.
(11) 4 De G. M. & G. 787.
(12) 2 De G. & S. 561.
(13) Law Rep. 20 Eq. 50.
(14) You. Eq. Ex. 1.

LORD PENZANCE:—

My Lords, the case depends upon a dispute between vendor and purchaser, the subject of the purchase being a public-house with some land and buildings adjoining, called the 'White Bear,' at Hampstead. The purchaser having signed a contract for the purchase of these premises, the suit has been instituted for the specific performance of that contract. A decree has been made that the contract ought to be specifically performed, and the questions which have subsequently arisen have been questions arising upon the title, the vendor being of course bound to make a good title—not an absolutely good title, but a good title in accordance with the contract into which he has entered.

The objections which have been made to the title are in the main three. The first is that the public-house was held under a lease from Meux & Co. the well-known brewers, and that the original lease which had been granted by Meux & Co. was invalid on account of the way in which it was executed. Sir Henry Meux, who was the chief partner in that firm, is and has been for many years a lunatic, and certain persons have been appointed as his committees in lunacy, and the lease in question is a lease made by Sir Henry Meux, acting by his committees, and the two other partners in the brewery, namely Sir Dudley Coutts Majoribanks and Mr. Richard Berridge. As was pointed out by one of the learned counsel there are in the course of the lease no less than three or four parts in which it appears over and over again that Sir Henry Meux was acting by his committees. The parties to the lease are so stated in the opening of it. The covenants, where they are made by Sir Henry Meux, are made in similar language, as acting by his committees. And at the end of the lease when we come to the witnessing part of it the words are "In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written." The complaint that is made is that the two committees, Lord Ernest Bruce and Lord Malden, set their own seals to this deed as if acting for themselves, and consequently that they did not legally and properly execute this deed as the committees acting for Sir Henry Meux.

The parties to the presents were Sir Henry Meux, Sir Dudley

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Majoribanks, and Mr. Berridge; and the only sense in which Lord Ernest Bruce and Lord Malden could set their seals to such an instrument as parties would be as representing Sir Henry Meux. I really am at a loss to know how a deed of this sort could be properly executed if this was not a proper execution. Sir Henry Meux did not himself attach his seal; he was acting by his committees; they were to set Sir Henry Meux's hand and seal to this deed. But how could they do that except by putting their hands upon a seal and declaring that they did that on behalf of Sir Henry Meux? It seems to me that that is the only way in which they could do it. But then it is said that they did not do that. What proof is there that they did not do it? There is no proof at all. The only thing that sounds like a proof that they did not do it in that way is that the attesting witness has written underneath "Signed, sealed, and delivered by the within-named Lord Ernest Bruce and Viscount Malden." And so it was; it was signed by them, and it was sealed by them, but the question is how? and about that the attesting clause says nothing whatever. There is nothing in this clause to make it impossible or even to make it unlikely that when they did actually put their hands to it and touch the seal they did so avowedly on the part of Sir Henry Meux. It seems to me therefore that this objection is one which if it had not been the subject of judicial decision I should have said was hardly worthy of serious argument.

I pass to the next objection. This lease was executed by the committees under an order of the Lord Chancellor or of the Lords Justices (which is the same thing), which order was made under the authority of a special Act of Parliament passed for the purpose of managing the affairs of this partnership. The complaint against that order is that the Lord Chancellor, or those who were acting in his place, instead of making a separate order upon every occasion when a public-house had to be let with respect to the execution of a lease of it, has made a compendious order giving power to the committees to execute leases on behalf of the lunatic whenever those leases are approved of by the other partners in the brewery and whenever they have received the sanction of the Master in Lunacy. It is said that that was ultrà vires; and the argument to that effect turns entirely upon the language of this

Act of Parliament. The language of the 3rd section, to which chiefly reference has been made, is as follows:—[His Lordship read it.] The statute confers upon the Lord Chancellor the power to make orders "from time to time" for those purposes, and thereupon it is argued that the words "from time to time" lead to the inference that upon every separate occasion the Lord Chancellor was to act himself, that the matter being brought before him in a proper way by affidavits, after having been brought before the Master in Lunacy, and the report of the Master in Lunacy being brought up to him, the Lord Chancellor should exercise his discretion upon it.

I confess it seems to me that that would be a construction which would vastly impede the business of a brewery of this kind and would also greatly increase the expense, and I think that your Lordships ought not to adopt such a construction as that unless you are satisfied that it is the necessary construction, because it is not only a question of the lease of a public-house, but it is a question of everything connected with the business of the brewery. If these words "from time to time" are to have that meaning, and it is to be inferred that the Lord Chancellor is to act separately upon each occasion, there is not a bargain for the sale of beer or for the purchase of malt or hops which according to the view of the Appellant ought not to be brought under the supervision of the Lord Chancellor. It seems to me that that would be a construction of a most inconvenient character. It is not one which I think your Lordships would lightly adopt, and I see no reason whatever for adopting it, because the words "from time to time" are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction. The meaning of the words "from time to time" is that after he has made one order he may make a fresh order to add something to it, or take something from it, or reverse it altogether; and as that meaning gives sufficient force to the words and explains the use of them here it seems to me that your Lordships ought not to go further and to narrow these words by any construction which would throw impediments in the

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way of carrying on the business, whereas the object of the Act was to facilitate it. Therefore I think nothing comes of that second objection. I do not quite know what became of it in the Court below. It was raised in argument, but whether it was seriously persisted in or not I do not know, at all events it was not noticed by the Lords Justices in their judgment.

Then I come to what may be called the substantial objection to this title. It is said that a covenant in the lease has been broken by sub-letting portions of those premises, one to a coach maker and another to a cab proprietor, that being contrary to a covenant in the lease that the premises should be used only in connection with the public-house and for the purposes of the public-house. This letting had taken place before the contract which your Lordships are now considering was entered into, but it is said, although that is true still the allowing those two people to remain in possession of those premises, using them in the way they did, was a continuing breach of that covenant in the lease. I do not propose to offer your Lordships an opinion as to whether it was a continuing breach or not. As far as I have been able to judge of it I see no reason to doubt the good sense and good law of the case of *Walrond* v. *Hawkins* (1), but I see that there is a great deal in what Bramwell L.J. says in respect to there being a difference between that case and this. If it were necessary to decide that point I should have required to go further into the matter. But I pass that by because the opinion which I have formed is quite independent of it, and therefore for the purpose of the present argument I will assume that there was a continuing breach of the covenant.

Then it is said that this continuing breach worked a forfeiture, and so that there was no title. But the question which the House has to determine is not generally whether this is a good title, but whether it is a good title under the contract; and the contract contains a clause upon which the whole of this part of the matter substantially rests. The clause is:—"The production of the last receipt for rent paid shall be taken as conclusive evidence of the due and satisfactory performance of the lessee's covenants contained in the lease by which the premises are held, or the waiver

(1) Law Rep. 10 C. P. 342.

of any breaches of the same covenants up to the time of the completion of the purchase whether the lessor shall be cognisant of such breaches (if any) or not." That is one of the terms of this bargain. Several times in the course of the argument I have heard the word "construction" used, and we are asked to construe this clause as meaning this, that, or the other. I am quite unable to see that any question of construction arises. The language is perfectly plain. It is that upon the production of the last receipt for rent it shall be taken as between these two parties either that there is no breach, or that if there is it has been waived; and that is said of any breach up to the time of the completion of the purchase. It is impossible to say that two constructions can be put upon this language.

But then it is urged that it is an unreasonable provision, and that looking to the knowledge of the vendor and looking to what he had the power to do, this is a condition—a portion of the agreement—which is inequitable, and which ought not to be upheld by the Court. If the question arose upon a suit for specific performance there might be a good deal to be said in that direction. It might be argued that this provision is so inequitable that the Court ought not to enforce it. I do not say that it is so; I only say that that is a matter which might well be argued. But I have been trying to look upon this very much in the way in which Bramwell L.J. looks upon it, and to say that if people choose to enter into a bargain of this sort and it tells heavily against them, the better thing is not that the Court should relieve them of it but that they should learn by experience how very unwise it is to enter into such bargains, and therefore should in future not enter into them. Where the language is plain and therefore no real question of construction arises, I think the Court is bound to execute the contract as it finds it, and if it presses hardly upon one party or the other the answer is that that party entered into it with his eyes open. Therefore it seems to me that a good deal could be said in favour of upholding this in whatever suit the question arose. But what does seem perfectly clear to me in this case is this, that whatever objections there are to this condition are objections which go to the question of whether the purchaser ought to be bound specifically to perform it. Once

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admit that he has made a contract which he is bound specifically to perform, then what you have to do is to see whether a good title is made under that contract and subject to the conditions which it contains.

The cases cited upon this subject with reference to the main point in this case are two: *Howell* v. *Kightley* (1) and *Bull* v. *Hutchens* (2). *Howell* v. *Kightley* (1) was, as it now turns out, a suit in the same position as if it had been a suit for specific performance, and the question was whether the vendor who did commit a breach of covenant after the contract, that breach consisting in not insuring as he was bound to do, ought to be entitled to insist upon specific performance. The Court held that in that case he was not entitled to insist upon specific performance. In *Bull* v. *Hutchens* (2) the same learned Judge had to deal with a case which was very much the same, although there is a distinction between them. If there is no distinction between them the latter case is the one which I think we must adopt as the result of the learned Judge's opinion upon the subject. If there is a distinction between them (which I think there is) we may pass by *Howell* v. *Kightley* (1) and look at what the learned Judge thought in *Bull* v. *Hutchens* (2). That was a case very much like this; there was a condition of this kind; and the Court distinctly held that inasmuch as the purchaser agreed that he would be content with the production of the last receipt for rent as evidence that the covenants had not been broken, inasmuch as he agreed to that he was bound by it and could not ask any title from the vendor which was not subject to that condition. Therefore *Bull* v. *Hutchens* (2) is distinctly in favour of the proposition which the respondent here contends for.

In parting from this point I will only add one word, namely, that the substance of a condition of this kind seems to me to be this; in making the bargain the purchaser agrees—"I will not raise any question about broken covenants. I will run my risk of any forfeiture of my lease that may have been incurred in respect of them. If there has been any breach I do not think it is likely that it will be pressed, but I will take the chance of that."

(1) 21 Beav. 331; 8 De G. M. & G. 325; 4 W. R. 477; 25 L. J. (Ch.) 341, 868.
(2) 32 Beav. 615.

I think that is the object with which a vendor inserts these conditions on a sale, and that is the object with which a purchaser agrees to such a condition. He takes upon himself the chance of whether there has been a breach, and if there has whether a forfeiture will be enforced.

Two other cases cited, *Curling* v. *Austin* (1) and *Gaston* v. *Frankum* (2), appear to me to have no bearing upon the subject. They are cases in which the purchaser had chosen to say upon some occasion that the only objection he had to the title was so and so, but that did not debar him afterwards from going more fully into the title and relying upon any objection to it which subsequently occurred to him. That is the substance of what was decided in those two cases. In both cases the purchaser had, as it were, cramped and confined himself by something which he had said or done since the execution of the contract leading to the conclusion that he only meant to rely upon one particular ground, whereas there were other grounds of objection.

Then *Rhodes* v. *Ibbetson* (3) is relied upon, but it really has no application to the case which we are discussing. The commencement of the judgment of Knight Bruce L.J. is this:—"This is a question upon the construction of a clause in a contract for the sale of ground rents." I will not go further than that. And Turner L.J. says:—"The sole question now to be decided turns on the construction of the contract." Therefore it was a question of construction. There was a clause put in there with reference to the title which the purchaser should be entitled to demand, and that clause was of an ambiguous character. The Court, looking to the language, and looking also to the general intendment which ought to be taken against the vendor, thought the clause ought to be construed against him and they decided accordingly, and said, if the vendor wishes to have his contract performed and claims specific performance he must have it, but he must have it with the contract understood and construed in the sense in which we now say it ought to be understood and construed. That was the whole of that case, and it really is only a case which applies to the question whether a particular clause in a contract should be construed

(1) 2 Dr. & Sm. 129. (2) 2 De G. & S. 561.
(3) 4 De G. M. & G. 787.

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in a particular way. Here the case is totally different—the clause is different and no question whatever arises upon its construction.

These remarks conclude what I have to say with reference to these objections. They all appear to me to fail; and I will now only say a word upon what was started at the end of the argument as to the form of the order:—[His Lordship read the order.] The first objection taken to that is that there are mortgages, and that this order does not provide for their extinction, to which it is answered that the defendant is ordered to execute a proper assignment of the premises, and that that must be construed to mean an assignment after the mortgages have been cleared away in some form. I think that no one can doubt that that is the proper construction of the order.

The next objection to the order is that it says that the plaintiff shall pay, and that upon his paying, the defendant shall execute an assignment—so that, it is said, the plaintiff might pay to-day and the defendant might not execute to-day—he might say he would, but a day, a week, a month, or even a year might go by and there might be no execution, and all the while the defendant might have got the plaintiff's money in his pocket. If I thought that the order really meant that, I should have no doubt that it would be wrong and that something ought to be done to set it right; but speaking for myself, the way in which I should construe the order would be that these two matters of paying the money and executing a proper assignment were reciprocal matters which would have to be done contemporaneously—that the one party was not bound to pay until the other party was ready to execute the assignment, and that the one was not bound to execute the assignment until the other was ready to pay. That is how I should construe the order, and I certainly shall not recommend your Lordships to interfere with the order as it stands, but the motion which I shall make to the House will be that the judgment of the Court below be affirmed with costs, and that that be done without prejudice to any application which the appellant may be advised to make to the Court below to vary this order for the purpose of making its meaning more plain. I cannot doubt that under the original powers of the Court, quite independent of any order that is made

under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every Court. Speaking of the Courts with which I have been more familiar all my life, the Common Law Courts, I have no doubt that that can be done, and I should have no doubt that it could also be done by the Court of Chancery. Moreover, having regard to the orders made under the Judicature Act, I should myself have thought that it would very well have come under those orders. I recommend your Lordships not to make any variation of this order, but to affirm it as it stands without prejudice to any such application to the Court below.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. It is desirable to see what the case on appeal is, for I think a great many of the points which were urged by the appellant's counsel should not be decided by this House, because they do not arise. I do not by any means mean to say that they are well founded—on the contrary, I think there are a great many of them to which there are obvious answers; but whether they are well-founded or ill-founded, whether they are good or bad, I do not think that this House ought to decide upon them, because I think they do not come before us.

There was a contract made in this case for the purchase of a particular lease on certain terms and conditions contained in a contract, some of which related to what should be the proper mode of making the title. That being the state of the contract between the parties, the now appellant instituted a proceeding in the Court of Chancery to set aside that contract on various grounds. He was met by the vendor (the now respondent), who made a counter-statement and a counter-claim that he should have specific performance of his contract. Hall V.C. came to this conclusion: "The Court doth order that so much of the plaintiff's claim" (that is the now appellant's) "as seeks to set aside the contract dated the 20th of February, 1877, in the pleadings mentioned, be

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dismissed, and this Court doth declare that the said contract ought to be specifically performed and carried into execution, and doth order and adjudge the same accordingly, and it is ordered that the following inquiries be made: An inquiry whether a good title can be made"—and so forth. Now it seems to me that the points which are raised and the objections which are urged arise upon whether a good title is made. I do not in the slightest degree doubt that there may be a case in which, a contract having stipulated for certain conditions as to what shall be the title, a Court of Equity may very well perceive that those conditions are so wrong, obtained by fraud or otherwise, that they may set aside the whole contract on the ground of those conditions. I can also very well see that a condition may be so unreasonable that without going so far as to say that the whole contract shall be set aside, the Court may say, You have this condition made under such unreasonable circumstances that this Court will not help you to specific performance unless that condition is struck out. All that may very well be, and if that had been the point raised in the Court below and a case had been made in support of it, and the condition had been struck out, or the specific performance refused on the ground that it ought not to be granted unless the condition was struck out, then that would have raised the question whether these conditions were so unreasonable and were such that they should be struck out or got rid of in that way. But that is not so here; there is no case of that kind. The decree which I have read stands unimpeached in the slightest degree. It stands that inquiry is to be made as to the title, and the inquiry is to be made according to those conditions as they stand. Further, I think it might happen that, there having been a decree of that kind, whilst investigating the title the parties might discover for the first time that there was really a substantial objection to specific performance; and it certainly would be very reasonable in such a case that it should be said, The Court will give a rehearing and see whether it does go to specific performance or not. Such a case might arise, and if the Court did grant a rehearing the Court would take evidence upon it. But then again that would go to the title.

That disposes as it seems to me of some of the points. I do

not think we can inquire here whether the condition in this case relied upon was reasonable or unreasonable. I own for myself I could not understand the grounds on which it was said that it was not reasonable. If I had thought that it was necessary to decide that question, I should have thought it was my duty to understand the grounds before I said whether I agreed with them or not, but as I think the point does not arise it is not necessary to do so.

It has been further said that inasmuch as there was a breach of covenant here—as evidently there was—and the breach of covenant was such that the day after the contract was thoroughly completed there might be a contention, perhaps a well-founded contention, raised that the breach of the covenant was a continuing one, and that the purchaser could not possibly hinder it, that would make the title so infirm that the purchaser could not be forced to take it. Although the title would be good up to the completion of the contract, yet as it was obvious that the day afterwards there would be an infirmity which might interfere with it, it was said that that was so infirm and invalid a title that the Court of Chancery should upon equitable grounds refuse specific performance to order the purchaser to take such a title. If that point were properly raised it would be plausible enough. But then you would require to shew that the facts were so—and, if the fact was, as I observe in the abstract of title it is asserted to be, that the lessor's solicitors were so far from going to take advantage of that forfeiture that they had been all along encouraging the sale and were in fact parties to the sale, and saying that they would make the thing all right if there was anything wrong about it, I can hardly think that the Court would refuse specific performance upon that ground. I do not therefore consider it necessary to decide upon the question, which is perhaps a question of some doubt and difficulty, whether, when the lessor had waived the breach of covenant which is here complained of, and when that breach of covenant in allowing others to occupy a stable for purposes not connected with the public-house was committed by granting a lease for a year, and consequently until the year ended neither the vendor nor the purchaser if he took the lease could possibly hinder the sub-lessee, without his consent,

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from continuing to occupy it in that way—I say I do not inquire whether the waiver of that breach by accepting rent on the part of the lessor would or would not prevent him from complaining of the breach of covenant afterwards, and enforcing the forfeiture for the breach of covenant which was only committed because the lease for a year existed and could not be revoked. It would be very wrong and unhandsome indeed in a lessor to do that, or to try to do it, and I doubt very much whether he could do it.

But there is no doubt a distinction between the case of *Walrond* v. *Hawkins* (1) and the present case, owing to the form of the covenant there, as was pointed out by Bramwell L.J. It may be that the lessor if so inclined might forfeit this lease immediately afterwards, but then I think that point ought to have been brought forward either before the decree was made for the specific performance, or if as is suggested it was discovered for the first time afterwards, by getting a rehearing, and then I think evidence would be taken on all sides to see whether that was a sort of objection which ought to prevail. Therefore I think it is unnecessary to decide that question, and I prefer instead of deciding it to say that I do not think the question arises, and therefore I will not inquire into it.

Now comes the title, upon which I quite agree that questions do arise. There was to be a title made, and there was a contract stipulating that the title was to be made in a particular way. It is enough if the title be made according to the stipulations in the contract. That brings us to the question whether there is any defect in the title as made here. The contract is that "the last receipt for rent paid shall be taken as conclusive evidence of the due and satisfactory performance of the lessee's covenants contained in the lease by which the premises are held or the waiver of any breaches of the same covenants up to the time of the completion of the purchase whether the lessor shall be cognisant of such breaches (if any) or not." Now whether or not that is a hard condition—in some respects certainly it may be a hard condition—it seems to me that there is nothing whatever to say that it is not a valid condition, or to raise any doubt about what its

(1) Law Rep. 10 C. P. 342.

meaning is. If the lessor has accepted rent after there have been breaches of covenant, he knowing of them, that would be a waiver and would make the title good, notwithstanding the previous breaches. There is no need of a stipulation for that. But what the parties stipulate, to save trouble and expense, is this: We the vendors stipulate, and we the purchasers are content to take it, that the last receipt for rent shall without proof that there was any such express knowledge on the part of the lessor be taken as an absolute waiver of the breaches; and, further not merely that it shall be a waiver of breaches up to the time when the rent is received but that it shall be taken between us as conclusive evidence of what it certainly affords great probability of, namely that breaches if there are any of a similar sort are to be considered as waived up to the time when the purchase is completed. A party might refuse to enter into such a contract if he pleased, but if he has chosen to enter into it that while it stands affects his title.

Now coming to the objections to the title, for the reasons I have stated I do not think that the question, as to possible subsequent breaches after the contract was completed and the lease assigned over, now arises before this House. With regard to the other question as to whether or no there was a good title made with that condition up to the time when the contract was completed, I think it is plain that there was. If the contract was to be understood and construed as in some of the cases which have been cited fortius contra proferentem, it would be another affair. That would shew that it did not apply, but in this case it plainly does apply.

Upon the remaining two points I completely agree with what has been said by the noble and learned Lord now on the woolsack. First as to the order which was made by the Lords Justices under the Act of Parliament which enabled the Lord Chancellor (which term by the interpretation clause is made to include the Lords Justices) "from time to time" to make orders affecting Sir Henry Meux's estate; the argument—indeed I hardly know whether I should call it an argument—the point raised was that as the Act of Parliament said that the Lord Chancellor might do it "from time to time" he must do it by a fresh and separate instrument every time he did it. I cannot agree in

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that at all. I think that the order under the Act was intended to be just such an order as the Lords Justices, giving a sensible interpretation to it, have made; and I think that if they had made a mistake, which in my opinion they have not, and had gone a little further in making the order than they have done, still by the 6th section, inasmuch as that order was made for the purposes of carrying out the Act, a lease granted under it is to be perfectly good, just as if Sir Henry Meux had executed it himself. I cannot think there is the least ground for that objection, and I shall not add anything more upon it.

The next objection was this. The attesting clause of this deed runs thus, "In witness whereof the said parties to these presents have hereunto set their hands and seals." It was said, That deed, which is a perfectly good deed upon the face of it and all right, is not to be taken as duly executed because Lord Ernest Bruce and Lord Malden have each put one seal opposite his name, so that there are two seals affixed by them and affixed by them separately, whereas it is asserted that there ought to be one seal affixed as Sir Henry Meux's. I can only say that that is treating the instrument as if magis pereat quam valeat. I quite agree with what James L.J. says as to this (1). If Sir Henry Meux's seal were applied by one of his committees at one time, the other committee who had not been present at that moment might come and apply his seal at another time; then if it was delivered as he says that would be a delivery of the deed for Sir Henry Meux and would be perfectly good. Why that should not be I have heard no authority to shew. The one authority relied upon was the case in Moore's Reports (2), which, for the reasons which have been pointed out, does not seem to me to apply. Therefore I cannot but agree completely with the unanimous judgment of the Court of Appeal (although it is against the opinion of a very learned Judge, Hall V.C.) that there is nothing in that objection.

I think that that disposes of the whole of the objections to the title; and as to the form of the order I will only say this. I have no doubt whatever that if the order has the effect suggested of saying that the money is to be paid now and credit given and at some future period there will be a deed executed, the order is

(1) 14 Ch. D. 256. (2) Pl. 191.

wrong. But looking at the order and construing it my own impression is that it means nothing of the sort. I should construe the order without hesitation as meaning this, that the deed having been prepared the deed and the money are to be exchanged as contemporaneous acts. If so it is perfectly right. But I am very unwilling indeed to have anything done that should affect the forms of orders drawn up by the Chancery registrars, because that is a matter which the registrars and judges of the Court of Equity have so much more knowledge of than I. Therefore although I quite believe that this form of order is right I fully agree that it would be prudent and wise in affirming the judgment of the Court of Appeal to add that this shall be without prejudice to the appellant applying to the Court to set the order right if it is supposed to be wrong. Subject to that, which ought to make no difference whatever as to the costs, I think the judgment below should be affirmed with costs.

LORD WATSON:—

My Lords, I also am of opinion that the judgment of the Lords Justices ought to be affirmed.

As to two of the objections which have been taken by the appellant to the title offered on the part of the respondent, namely those founded on the alleged defect of power in the Lords Justices to make the order of the 26th of April 1867 and the alleged defects in the execution of the lease in December 1868, I have nothing to add to what has been said by your Lordships. The objections in themselves appear to me to be of a very slender and unsubstantial character, and they have I think been very fully disposed of in the observations of my noble and learned friend on the woolsack.

The remaining objection urged on the part of the appellant appeared to me to be much more worthy of attention, but in considering it, it is right to keep in view the position in which the parties stood in this litigation at the time when the reference was made for inquiry into the state of the title. It had then been judicially found as between them that the appellant was bound specifically to perform his contract according to its terms and conditions. I am certainly not prepared to say, that even after

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such a decree for specific performance has been pronounced, if upon inquiry it shall appear that circumstances unknown before bear either upon the construction of the contract or upon the equity of the contract, the Court may not have power to give a remedy either by re-considering its judgment as to specific performance, or by putting a construction upon the contract, where its terms are ambiguous, favourable to the purchaser, who has naturally and necessarily been in ignorance of the facts so ascertained upon inquiry. But no question of that kind appears to me to arise in this case. As I read them the terms and conditions of this contract of sale are perfectly clear and free from all ambiguity. It appears to me that those terms were carefully framed for the purpose which they were calculated to carry out, of laying upon the purchaser the very risks of which he now complains; and in addition I can see nothing in the circumstances of the case which would render it either unreasonable or inequitable to hold that the appellant must fulfil his bargain according to its terms. I therefore agree with your Lordships.

In regard to the form of the judgment which was pronounced in the Court below, I have only to say that I should be very slow to put upon the terms of that order the construction which the appellant seeks to put upon it as against himself; but not being conversant with the technical forms of order in the Court below I think the safer course for this House in dealing with it, is to follow the course which your Lordships have proposed.

Order of the Court below affirmed; and appeal dismissed with costs, without prejudice to any application which the Appellant may make to the Court below to vary its order by stating that the execution of the assignment and the payment of the moneys therein mentioned are to be contemporaneous. Cause remitted to the Chancery Division.

Lords' Journals 29th Nov. 1881.

Solicitors for appellant: *Yorke & Wharton.*
Solicitors for respondent: *Hunters, Gwatkin, & Haynes.*

[HOUSE OF LORDS.]

SIR GEORGE ELLIOT BART. AND JOHN JOHNASSON . . . . . } APPELLANTS;

AND

LORD ROKEBY . . . . . RESPONDENT.

H. L. (E.) 1881 Dec. 5.

Mining—Winning.

By a deed of grant and license the licensee was empowered to win and work all and every or any of the coal mines seam and seams of coal under certain lands, and to reimburse himself all expenses incurred in the winning out of the profits from the sale of the coal; and it was provided that after payment to the licensee of all expenses in winning the said colliery coal mines or coal mine seams or seam of coal, he should pay the grantor such royalty for the coals yearly wrought out of the said coal mines seam or seams as should from time to time be awarded by two arbitrators once in every five years whilst the said coal mines seam or seams of coal should continue to be wrought.

More than one seam of coal lay under the lands. The licensee after winning one seam went on to win another:—

Held (reversing the decision of the Court of Appeal upon this point), that the whole colliery was not won when the first seam was won, but that the deed was to be read separatim as to the winning of each seam, and that the licensee was entitled to reimburse himself the expenses of winning the second seam before any royalty was payable as to that seam.

APPEAL from an order of the Court of Appeal (1).

The question now decided by this House turned entirely on the construction of the deed of March 7, 1775, the material parts of which are set out in the report of the case before Fry J. (2).

For the present report the statement in the head-note is sufficient.

Benjamin Q.C. and *Davey* Q.C. (*Williamson* with them) for the appellants began by admitting that the definition of "winning" adopted by the Court of Appeal (3) was as satisfactory a definition as could be given, and abandoned without argument every one of the points raised by the appeal except the one upon the construction of the deed which is stated in the headnote. Their arguments upon this point sufficiently appear from the judgments.

(1) 13 Ch. D. 277. (2) 9 Ch. D. 685.
(3) 13 Ch. D. at p. 279.

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Cookson Q.C. and *H. A. Giffard* for the respondent contended that the decision of the Court of Appeal was right.

Davey Q.C. replied.

EARL CAIRNS :—

My Lords, the only point presented for your Lordships' consideration is a very short one. It depends on the construction of the deed of the 7th of March 1775. That deed provided that the persons who might work a colliery called the Barnston Colliery should be allowed the expenses of winning the coal, should be entitled to recoup themselves those expenses out of the proceeds of the sale of the coal, and that when they were recouped the expenses there should then commence an arbitration to settle from time to time the royalties to be paid for the coal after the expenses had been so recouped. Upon that the question arises in this way. There were at least two seams of coal which had been worked in the colliery; was the winning of the first of those seams the stage up to which the expenses were to be recouped, and was there then to be no further recouping of expenses when the persons working the colliery went on to the second seam and won it? Or was the working to be looked at from time to time as each seam was worked, and was there to be a recouping of the expenses of working each seam as each seam was worked from time to time?

That is a very simple question, and but for the fact that both the Courts from which this appeal comes have adopted a different construction of the deed, I should myself have said that the construction of the deed appeared to me to be very plain. And I cannot help thinking that if the case had not been obscured before both the Courts below—the Court of Fry J. and the Court of Appeal—by larger issues being contended for on both sides, and if the narrow point which now has been presented to your Lordships had been presented to those Courts, those Courts might upon that narrow point, presented to them in that form, have come to a different conclusion. At all events I am bound to say that in my opinion the construction of the deed is reasonably clear. I think the deed is capable of being read, and ought on all just principles of construction to be read, separatim. It gives permission to work all or any of the seams of coal in the colliery

in question, and it appears to me that as each seam is worked there is to be, or there may be, a separate reckoning with regard to the expenses of winning that seam, and the person working may recoup himself those expenses before the time arrives when he is to be made acountable for the royalties on the sale of coal got from that seam.

Various suggestions have been made to your Lordships as to the inconvenience of that process. I do not see any inconvenience. If the deed had provided in words which could not have admitted of an argument (and it might very well have done so)—you the occupier may work any seam of coal on this property you like, and when you work a seam you shall first be entitled to recoup yourself the expenses of winning that seam, and then there shall be an arbitration to fix the royalty payable by you in respect of the coal subsequently got from that seam—if I say the deed had provided that and in those terms, there might have been perhaps a complication but not anything extravagant, unnatural, or even inconvenient in that arrangement. However it appears to me that that is the reasonable construction of the deed and the construction which must prevail.

That will lead to an alteration in the decree, and the form of the alteration I do not understand to have been gravely disputed between the parties. I will mention it presently. But that will raise a further question which I am afraid is the principal question in the case at present, the question of costs. Now when this case came before the Court of Appeal it appears to me that the present appellants were entitled to have had from the Court of Appeal the alteration in the decree which I am about to propose, and if they had asked for that alteration and had not asked for a much wider and greater alteration, I think they might fairly have contended before the Court of Appeal that they not only should have that alteration made but should have awarded to them the costs of the appeal. As it was the Court of Appeal made what they seem to have considered to be an alteration only of form, changing the interest from 4 to 5 per cent., and ordered the present appellants to pay the costs of the appeal. In my opinion your Lordships should substitute the altered decree which I am about to suggest, and inasmuch as that falls far short of the contest of the appellants before the Court of Appeal, I think

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your Lordships will meet the justice of the case by simply reversing that part of the judgment of the Court of Appeal which ordered the present appellants to pay the costs of that appeal. That will leave each party to pay their own costs of the appeal in the Court of Appeal.

I think the same principle ought to govern the question of the costs before your Lordships. If the present appellants had come here merely contending for the point on which they have succeeded they might have had a fair case to ask your Lordships to indemnify them for the costs of the appeal. But they certainly came here and launched their appeal (I do not speak of the more prudent course taken by their counsel at the Bar, but of the course taken by their petition of appeal and by their case) asking for a much wider measure of relief than it appears to me they are entitled to. I think therefore your Lordships will do well with regard to the appeal before this House in not providing for the costs of either party but leaving each party to bear their own costs.

If your Lordships take that view of the case you will make these alterations in the decree. [His Lordship then read the alterations, the substance of which is stated at the end of this report.] Those are the alterations which I read to the counsel in the course of the discussion and which will meet the object I have in view, and I propose therefore that the decree should be varied in the respect I have mentioned and that no order should be made as to costs.

LORD BLACKBURN :—

My Lords, I entirely agree on both the points that have just been mentioned. When Fry J. decided the case in the first instance and made his decree he decided a great many things in favour of the now respondent and against the appellants. One of those, namely the construction of the deed, was one in which I do not agree. Then upon the appeal to the Court of Appeal there were a number of things appealed by the present appellants, upon all of which—except this one and the question as to the rate of interest—they were held to be wrong ; upon this one which was not brought out very clearly, according to the view which ought as I think to have been taken on the construction of the

deed, they were right. Then came the appeal to this House. The petition of appeal, the notice of appeal, the cases and everything shewed that the appellants were seeking not only to set right this one point on the construction of the deed upon which I think that the Courts below had gone wrong, but they wanted also as they said to set right but in reality to set wrong a number of things of a great deal more importance. The respondent Lord Rokeby if he were advised to give up this one question (which may or may not be of importance) of the construction of the deed could not give it up upon such an appeal as that, and accordingly he was obliged to come here to defend the rest which were very important to him and which were all right—so right that the learned counsel for the appellants when they came to the argument, but not until they reached this Bar, admitted that they could not argue them.

Upon that view of the matter I most completely agree that there being a success to the appellants on one point of their appeal, it is not reasonable that they should pay costs to the other side. But there being so very much upon which they have forced the respondent to come here for no purpose, I think the respondent on the other hand should not be obliged to pay costs either. Consequently as Lord Campbell used frequently to say in the Court of Queen's Bench in such cases, "the costs are to the victor, but where there is no victor there can be no costs." I think that would be the right principle here.

As to the question of the construction of the deed itself I think it turns after all upon a very few words. We have to see what is the meaning of the particular instrument. The words are that John Tempest, whom Sir George Elliot represents, may "by such ways and means as he or they shall think fit win and work all and every or any of the coal mines seam and seams of coal" and so on. Now taking that by itself without anything else it seems plain that that would give power to win and work *any* of the coal mines seams and so forth, and consequently that he might from time to time by such means as he pleased win and work any of the seams. It is argued that what follows afterwards shews that it would have been reasonable and prudent to say that he must win the coal mine as an entirety, although when he has won the mine as an entirety he may work any of the seams at his pleasure and when he likes. I do not say whether that would

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Lord Blackburn.

have been a better contract to have made or not, but I do say that, whether it would have been wise for the parties to make that contract or not, I cannot looking at this contract see by any words that they did so. The first words which I have read shew that the working is distributive as to any seam and the winning is there made also distributive as to any seam. I am unable to find anything in what follows or in what was urged in the argument either in the Courts below or in this House to lead me to the conclusion that they did make such a contract, and therefore I think the Courts below fell into an error in that construction and that it should be put right. I quite agree that the alterations in the decree which have been proposed to your Lordships effectually accomplish that purpose.

LORD WATSON concurred and for the same reasons.

Order appealed from reversed as to that part which directed the appellants to pay the respondent his costs in the Court of Appeal; decree of Fry J. further altered by omitting the declaration that the "coal mines seam and seams of coal" were won on the 15th July 1864, and by inserting a declaration that according to the true construction of the deed of 7th March 1775 the Maudlin or upper seam was won on the 15th July 1864 and that the Low Main being the next seam was won on the 31st July 1865; and that the costs charges damages and expenses which the defendants had borne in and about the winning of the Low Main seam should include certain items; and by making other alterations in the decree rendered necessary by the decision of the House; cause remitted to the Chancery Division.

Lords' Journals, 5th Dec. 1881.

Solicitors for appellants: *Williamson, Hill, & Co., for R. P. & H. Philipson & Cooper, Newcastle.*

Solicitors for respondent: *Frere, Forster, & Frere.*

[HOUSE OF LORDS.]

SHEPHERD . . . . . APPELLANT;

AND

HENDERSON . . . . . RESPONDENT.

H. L. (Sc.)
1881
Dec. 1.

Cause originating in Sheriff's Court—Competency of Appeal under sect. 40, 6 *Geo.* 4, *c.* 120—*Findings of Fact—Issue raised in the Pleadings—Ship —Acceptance of Abandonment—Matter of Law or Fact.*

The 40th section of 6 Geo. 4, c. 120, provides: "When in causes commenced in any of the courts of the sheriffs, or of the magistrates of burghs, or other inferior courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matters of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends on or is affected by matter of law."

A. raised an action in the Sheriff's Court against B. for £50, the sum payable by him as underwriter on a policy of insurance on A.'s vessel the *Krishna*. On the 23rd of May the vessel was driven on a sandy beach on the West Coast of India, during a violent storm. Soon afterwards the usual monsoon commenced and lasted till October. On the 7th of June A., on hearing from the master that it was impossible to save the ship, gave notice of abandonment to the underwriters; which they refused to accept. On the 1st of October A. raised this action averring that the vessel had become a wreck, and in his amended pleadings he set out that the underwriters had taken possession of the vessel on the 15th of October and had floated her on the 16th of November, and taken her to Bombay and had docked her and executed certain repairs, and that thus the underwriters had accepted the abandonment.

The underwriters alleged that they only took possession of the vessel as salvors, that no repairs were done except for the safety of the ship, and that A. was informed of all they were doing, and to the last it was intimated to A. that the vessel was lying at Bombay at his risk.

The Court of Session found, inter alia, "that the underwriters did not accept the abandonment: that there was on the 7th of June and continued thereafter to be a reasonable prospect of the ship being got off the sandy shore on which she lay without greater expense than a prudent uninsured owner would reasonably incur," therefore that there was not at that date a constructive total loss of the ship.

A. contended on the question of the competency of his appeal (1) that the

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finding that the underwriters did not accept the abandonment, was a matter of mixed law and fact; (2), that the findings of fact were incomplete, and ought to be rectified on remit:—

Held, applying the rule of *Mackay* v. *Dick* (6 App. Cas. 251) that the Court had decided the issue submitted to them, an issue of fact and not of law; namely, that the underwriters did not accept the abandonment, and accordingly their finding was not open to impeachment under sect. 40 of 6 Geo. 4, c. 120; and (2), that looking at the controversy raised by the record, the findings in fact were reasonably complete.

Per Lord PENZANCE:—The question whether the underwriters accept the abandonment or not is a question of fact; but the circumstances of the case may be such, that a jury may be told as a matter of law, that if they think the underwriters have done certain acts which are consistent only with their having accepted the abandonment, then they ought to find that the abandonment has been accepted.

Remarks, whether in Scotland constructive total loss is to be taken from the date of notice of abandonment, or from the date of commencement of action.

APPEAL from the Second Division of the Court of Session, Scotland.

This action was commenced in the Sheriff Court of Lanarkshire, by the appellant seeking for payment of, inter alia, the sum of £50 being the sum payable by the respondent as underwriter on a policy of marine insurance on the steamship *Krishna*, upon the footing that there was a constructive total loss of that vessel. The respondent and other underwriters contended that the underwriters were only liable as for a partial loss.

The *Krishna* is an iron screw steamer of less than 200 tons. She was built in 1878 and the above-mentioned insurance was effected on her in that year for twelve months from the 23rd of September in the sum of £8000.

The vessel in the course of her voyage from Goa to Bombay on the 23rd of May 1879 encountered a hurricane, and being in danger of foundering, the master ran her ashore. She took the beach end on, and on the storm abating, it was found that she was about 100 yards from low water, on a beach of fine shifting sand, near Reri Fort and nine miles from Vingorla on the West Coast of India. Every effort was made by the master and crew to get her off before the south-west monsoon commenced, but without success. The monsoon commences in June and lasts till October. On the 5th of June the master telegraphed to the owner's agent

that he gave the vessel up for lost, but wrote that he had secured all ship furniture below decks and had covered up the machinery. On receipt of this intelligence the appellant, on the 7th of June, gave notice of abandonment to the underwriters. At that date the vessel had been driven higher up on the sandy beach; and a sandbank had been formed between her and the sea. These proceedings were commenced against the respondent on the 1st of October.

In the middle of October, after the monsoon had come to an end, the underwriters sent Captain Burns as their agent to where the vessel lay to endeavour to get her off. After a month's work this was done, and she was towed to Bombay and offered to the appellant.

The pleadings were amended under permission of the sheriff in respect to these matters.

The material part of the condescendence of the appellant and the answer thereto of the respondent were as follows:

(COND. 3).—On or about 23rd May 1879 the said vessel, while prosecuting a voyage from Panjim to Bombay, within the limits defined in the said policy, was overtaken by a violent storm, in which heavy seas broke over her, carrying away deck furniture and fittings, and filling the hold and cabin with water, and she was driven on the beach to the northward of Reri Fort, where she was abandoned and became a wreck. The said vessel was when she commenced the said voyage properly manned and found, and was in every way seaworthy. With reference to the defender's additional statement in answer, it is explained that on or about 15th October 1879 the said vessel was taken possession of by Captain Burns of the Glasgow Underwriters' Association, by the instructions or on behalf of the defender and of the underwriters upon the said policy of assurance, which had previously expired on or about 22nd Sept. 1879, that the said vessel was floated by the said Capt. Burns on or about 16th November 1879, and was towed to Bombay under his charge on 3rd December 1879, where she was docked by his instructions, and certain repairs were executed upon her by his orders, and that the said vessel was undocked on or about 13th December, and moored in the harbour where she is now lying at the risk of the defender and the said underwriters. The defender and the underwriters thus accepted the pursuer's abandonment.

(*Ans.*)—Admitted that the ship stranded about the date stated on the beach to the northward of Reri Fort. Quoad ultra denied. Explained that the ship was run ashore with the view, as the master avers, of saving life, and that she is little, if at all, injured, and can and will be got off the beach within a reasonable time without her sustaining material damage. Explained further that recently said ship has been floated and taken to Bombay, where she now lies little injured. The pursuer's statement in answer is denied, subject to the following expla-

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nations:—Captain Burns took part, along with the master of the *Krishna*, in salving that ship. He arrived at the ship about 15th October 1879. She was got off about 16th November 1879; and as she could not remain where she was, was towed to Bombay. When there it was necessary, for the due preservation of the *Krishna*, to dock her and do some painting. No repairs were done, and nothing was done except what was required for the safety of the ship. Captain Burns was acting on behalf of the whole underwriters on the ship, including Messrs. Whitworth and the Imperial Marine Insurance Company of Liverpool, both of which latter underwriters by their policies have special right to act in regard to preserving the ship. As regards the Glasgow underwriters, they acted in accordance with the usual practice under policies similar to the pursuer's, and which practice was known to pursuer and his brokers. They acted solely as salvors. They at all times intimated to pursuer their actings, and he never suggested that he would in consequence hold them as accepting abandonment. The ship was anchored at Bombay about 13th December 1879, and it was again intimated to pursuer that she was lying there at his risk; and while he refused to take her on the ground she was a total loss, he never then, or until the present addition was made, intimated that he held defender had accepted abandonment. The defender and the underwriters have suffered loss by the pursuer's failure to raise this plea sooner, if it is well founded—as the ship has deteriorated in value, and she has not been used since December; and the pursuer is barred from now raising said plea. It was intimated to pursuer in August 1879 that the underwriters intended in October to assist in salving the *Krishna*, and pursuer made no suggestion that if they did so, he would hold them as accepting abandonment.

Pleas in law for appellant were:

(1). The said vessel having become a total loss by the perils insured against, and having been timeously abandoned by the pursuer, he is entitled to decree against the defender as one of the underwriters on the said policy of insurance for the sum underwritten by him.

(2). The underwriters upon the said policy having accepted the pursuer's abandonment, decree should be granted as craved.

The sheriff on the 8th of December 1880 found, inter alia, that the underwriters did not accept the abandonment; that in August and September and at the date when this action was raised the *Krishna* was not in any risk of sustaining further injury where she lay, and that regard being had to the usual course of the monsoon, there was then a reasonable prospect of her being got off the sandy shore where she lay, without greater expense than a prudent uninsured owner would reasonably incur, Find therefore that there was not on that date a constructive total loss of the ship such as to entitle the pursuer to abandon her to the underwriters (1).

(1) The sheriff in his note said, "If the legal effect of the abandonment were to be judged of according to the facts as they stood on the 7th of

Against this interlocutor the appellant appealed to the Court of Session. And the respondent submitted to the review of that Court the portion of the sheriff's interlocutor by which it was in effect found that there was a total constructive loss on the 7th of June.

The Lords of the Second Division on the 25th of February 1881 pronounced the following interlocutor:

Find that on 23d May 1879 the pursuer's steamship *Krishna*, being then insured in terms of the policy founded on, and the defender (respondent) being an insurer to the extent of £50, was stranded during a violent storm on the coast of Hindostan, between Payjim and Bombay: Find that on or about the 7th day of June following, the pursuer (appellant) intimated to the underwriters in said policy that he abandoned the *Krishna*, and claimed as for a total loss: *Find that the underwriters did not accept the abandonment*: Find that the pursuer brought this action for indemnification of his loss upon the 1st day of October 1879: Find that shortly after the stranding of the *Krishna* the south-west monsoon began upon the coast of India and continued till the end of September or beginning of October, and that during its continuance it was impossible to get the *Krishna* afloat: *But find that there was on the 7th of June, and continued thereafter to be, a reasonable prospect of her being got off the sandy shore on which she lay without greater expense than a prudent uninsured owner would reasonably incur*: *Find therefore that there was not at that date a constructive total loss of the ship*: *Therefore dismiss the appeal, affirm the judgment of the sheriff appealed against, and decern* (1).

The appellant appealed against the portions printed in italics. The respondent contended these were findings in fact and could not competently be reviewed by this House in accordance with the terms of the 40th section of 6 Geo. 4, c. 120.

Nov. 29, Dec. 1. Mr. *Butt*, Q.C., and Mr. *Pollard* (with them Mr. *Guthrie*, Scotch Bar), contended for the appellant that there was no such distinct findings here as to what the Court found as

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June when notice was given, it would be difficult to say that the vessel, though then existing in fact, was not lost so far as beneficial use to the owner was concerned. The validity of abandonment as at the date of notice is not however a point which must be decided here; because I think by the law of this country it is necessary to the pursuer's success that the circumstances should have continued to be such as to involve a constructive total loss down till the raising the action." Cases examined:—*Robertson* v. *Stewart*, 15 Fac. Coll. 165; 2 Dow, 474; Bell's Comm. vol. i. p. 655; *Bainbridge* v. *Neilson*, 10 East, 329; *Brotherston* v. *Barber*, 5 M. & S. 418.

(1) 8 Court Sess. Cas. 4th Series, 518.

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matter of law and what as matter of fact as there ought to have been. The finding "that the underwriters did not accept the abandonment," having regard to the statements on the record here, was a question of law, or at the least of mixed law and fact, and therefore the 40th section of 6 Geo. 4, c. 120, relied on did not apply. The opinions of the Judges of the Court of Session and the condescendence shewed that the question was raised in the Court below whether the underwriters had done any acts inconsistent with the character of salvors, and which would constitute in law an acceptance. The underwriters had certainly refused to accept the notice of abandonment, and had alleged that they acted only as salvors, but there might be such a dealing with the ship as to give rise to a legal inference that they had assumed the character of owner, and so had accepted the abandonment—acts prevailing over express declarations. Such a dealing with the ship as selling her would as a matter of law imply acceptance: *Hudson* v. *Harrison* (1). Further in law, also, if the underwriters repaired the vessel: *Provincial Insurance Company of Canada* v. *Leduc* (2). There Sir Barnes Peacock said, "whether the abandonment has been constructively accepted is a mixed question of law and fact." See also *Peele* v. *The Merchants Insurance Company* (3). Secondly, the findings in fact were incomplete and did not warrant the legal conclusion. For words "therefore find that there was not a constructive total loss," three considerations were necessary, —the chance of getting the ship off; the delay in doing so, and the chance of her being worth repair by a prudent uninsured owner. They submitted there should have been a finding whether the vessel was worth repair, and in that the interlocutor was defective, for it might very well be that though the vessel was got off and towed to Bombay that she was not repairable than at a greater expense than the total value of the ship. The words of the Scotch Judicature Act 1825 were imperative that the Court should find all the facts with the strictness required in a special verdict—nothing is to be intended. They submitted therefore that the interlocutor contained findings of mixed law and fact, and consequently was subject to appeal to this House; and at all

(1) 3 B. & B. 97.
(2) Law Rep. 6 P. C. 224, 239.
(3) 3 Mason, 27, at pp. 80, 81; Phillips on Ins. vol. ii. (5th ed.) 375.

events was incomplete in its findings in fact and ought to be rectified.

[They cited also *Moss* v. *Smith* (1) and *Irving* v. *Manning* (special verdict) (2).]

Mr. *Cohen*, Q.C., and Mr. *Hollams*, appeared for the respondent, but were not called upon.

LORD PENZANCE:—

My Lords, the questions raised in this appeal are raised under a statute of the 6 Geo. 4, c. 120, s. 40, and it is most material for the proper discussion of the questions which are now before the House that the terms of that statute should be carefully considered and understood. The 40th section provides: "When in causes commenced in any of the courts of the sheriffs, or of the magistrates of burghs, or other inferior courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matters of fact so found or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law." My Lords in this case the appeal has been brought to your Lordships' House under that section and that appeal must be upon matters of law, which the Court of Session are desired to separate and distinguish from matters of fact, which they profess to have done in the present case.

This is not the first time, my Lords, that this section in this Act of Parliament has come under your Lordships' notice. It was discussed in the case of *Mackay* v. *Dick* (3). It is quite unnecessary that I should trouble your Lordships with the facts of that case or with the decision of law upon those facts minutely. It will be enough if I read the headnote, which is in the following

(1) 9 C. B. 94. (2) 6 C. B. at p. 392.

(3) 6 App. Cas. 251.

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terms: "The 40th section of the Judicature Act of Scotland, 1825, enacts," then the headnote follows the enactment, which I have just read, and goes on thus: "In appeals falling within the scope of this section the House of Lords has no concern with the proof which has been led in the Sheriff's Court. When it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shewn by a reference to the record, and not to the proof. And if the questions are not raised by the record, no remit can be made." Therefore I understand your Lordships to have determined on a former occasion first of all, that if the Court of Session has specified any matter of law which they have determined, and determined wrongly, this House will reverse their decision; and, secondly, that the House of Lords in their discretion will remit a case to the Court of Session provided the Court has not exhausted the issue before it. My Lords, the action was brought before the sheriff substitute of Lanarkshire upon a policy of insurance, a time policy for a year, the period of which I think expired on the 22nd of September 1879, on a vessel called the *Krishna*, and the pursuer thus stated his case in his third condescendence. He described that the vessel was prosecuting her voyage, but she was overtaken by a storm "in which heavy seas broke over her" and she was driven on the beach, "where she was abandoned and became a wreck. The said vessel was, when she commenced the said voyage, properly manned and found, and was in every way seaworthy." "It is explained that on or about the 15th of October 1879" (the present action having been raised a fortnight previously, namely, on the 1st of October 1879), "the said vessel was taken possession of by Captain Burns, of the Glasgow Underwriters' Association, by the instructions or on behalf of the defender and of the underwriters upon the said policy of assurance, which had previously expired on or about the 22nd of September 1879, that the said vessel was floated by the said Captain Burns on or about the 16th of November, 1879, and was towed to Bombay under his charge on the 3rd of December 1879, where she was docked by his instructions, and certain repairs were executed upon her by his orders,

and that the said vessel was undocked on or about the 13th of December, and moored in the harbour where she is now lying at the risk of the defender and the said underwriters. The defender and the underwriters thus accepted the pursuer's abandonment."

In answer to that the underwriters said that it was quite true the ship was run ashore, but she was run ashore with the view of saving life, and that she was "little if at all injured, and can and will be got off the beach within a reasonable time without her sustaining material damage." There was a question as to whether that averment had been admitted by the pursuer, but I confess I do not think upon the whole it can be said to have been admitted. It must be taken to be an open question between the parties. The answer proceeds: "Explained further that recently said ship has been floated and taken to Bombay, where she now lies little injured." That is a continuation of the passage I was reading. "The pursuer's statement in answer is denied, subject to the following explanations: Captain Burns took part along with the master of the *Krishna* in salving that ship. He arrived at the ship about the 15th of October 1879. She was got off about the 16th of November 1879; and as she could not remain where she was, was towed to Bombay. When there it was necessary for the due preservation of the *Krishna* to dock her and do some painting. No repairs were done, and nothing was done except what was required for the safety of the ship. Captain Burns was acting "on behalf of" the underwriters. Then it goes on to state that the underwriters were a little differently situated, but substantially he was acting for them all. "They acted solely as salvors. They at all times intimated to pursuer their actings, and he never suggested that he would in consequence hold them as accepting abandonment. The ship was anchored at Bombay about the 13th of December 1879, and it was again intimated to pursuer that she was lying there at his risk; and while he refused to take her on the ground she was a total loss, he never then, or until the present addition was made, intimated that he held defender had accepted abandonment. The defender and the underwriters have suffered loss by the pursuer's failure to raise this plea sooner, if it is well founded, as the ship has deteriorated in value,

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and she has not been used since December, and the pursuer is barred from now raising said plea."

Now I take it that the substance of the controversy which the condescendence and the answers to it disclose is this. The pursuer says that the vessel was run ashore, that she was afterwards taken possession of by some one on the part of the underwriters, who floated her and took her to Bombay, that certain repairs were executed upon her, and that she was then left in the harbour, and this, he says, constituted a taking to the vessel as the property of the underwriters. Then the underwriters (the defenders) say: It is quite true that the agent for the underwriters took possession of her, that he got her off the bank of sand that she was lying upon, and then, because she could not remain there, she was taken to Bombay, that no repairs were done to her except such as were absolutely necessary for the then safety of the ship, and that throughout he acted upon the part of the underwriters, not in protection of their own property, but as salvors of the ship. They then go on to say that the pursuer was quite aware of what the agent was doing, and never suggested that in so doing he was accepting the abandonment, and that throughout and up to the last it was intimated to the pursuer that the vessel was lying at his risk, which of course was inconsistent with the underwriters having accepted the abandonment; and that the suggestion that they had accepted the abandonment ought to have been raised earlier. That is the substance of the controversy as it stands upon the record.

Under these circumstances the Court of Session made the interlocutor which is the subject of the present appeal, and, discharging their duty under the statute, the Court of Session found that the vessel, being insured, was stranded; that on the 7th of June "the pursuer intimated to the underwriters" that he had abandoned her, "and claimed as for a total loss;" "that the underwriters did not accept the abandonment;" that "the pursuer brought this action for indemnification of his loss upon the 1st day of October 1879," and "Find that shortly after the stranding of the *Krishna* the south-west monsoon began upon the coast of India, and continued till the end of September or beginning of October, and that during its continuance it was impossible to get the

Krishna afloat. But find that there was on the 7th of June, and continued thereafter to be, a reasonable prospect of her being got off the sandy shore on which she lay, without greater expense than a prudent uninsured owner would reasonably incur; Find therefore that there was not at that date a constructive total loss of the ship."

Now, my Lords, I will deal with this last part first, because I think it involves the most substantial objection that has been urged to this interlocutor. The finding of law is that there was not at that date a constructive total loss of the ship. Well, if that is to be taken as a general proposition quite independent of the particular controversy which has been raised by the record, and by the parties at the trial, I think no one can doubt that the previous statement, namely, that there was a reasonable prospect of getting the vessel off, is not one which would support the general proposition that therefore there could not be a constructive total loss of the ship, because it might very well be that the vessel was quite unfit to be repaired; although there was a fair prospect of getting her off. In a word, a vessel which could be got off, but which, when got off, was so much damaged as not to be fit for repair, might still be a constructive total loss. But I think it would be very unreasonable for your Lordships to read this finding in matter of law dissociated from the matter of fact with which it is placed in connection, and the matter of fact to which this finding was addressed was not whether the vessel was so damaged as to be not worth repair, for there was no proof or controversy raising that question, but only whether she could be safely got off the shore. As I read this record, and as I read the judgments of the learned judges below, the substantial question before them was this: Here was the vessel run upon the beach in the month of June, and in those parts of the world there is a wind that blows pretty continuously for a certain number of months called the monsoon, and a very violent wind it is at times. The question was, whether, looking at the fact that this monsoon would be blowing all July, and August, and September, and into October, it was what a prudent man would do to leave the vessel there at the chance of her being utterly broken up and destroyed by the wind, or whether he would with greater

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prudence sell the materials as they lay for what they would fetch. I think that was the substantial question which was raised, and I think it is most important to bear in mind that neither in the condescendence nor in the answer to it is it said that as she then lay (I am dealing with the matter entirely as it stood on the 7th of June) she had suffered any damage at all. I do not think there is any allegation or any suggestion that she had suffered any damage. That is not either averred in the condescendence or denied in the answer. The answer says "that she is little if at all injured," but that means at the date of the answer. There is no averment in the condescendence that she was damaged, still less that she was damaged to such an extent that she could not be repaired within her value.

Therefore, I think, my Lords, that this being the substantial point, we must read the finding of the Court below as applied to the controversy which had been raised between the parties, and, applied to that controversy, it comes to this: that in the opinion of the Court there was on the 7th of June so fair a chance of this vessel escaping the monsoon (as indeed afterwards in fact turned out to be the case, though I do not think that has much to do with the matter), that a prudent owner would, although it might involve him in some expense, leave her where she was with the intention of getting her off after the monsoon was over. I think that is what is intended to be said, and in so saying the Court did decide, and did properly decide. If the pursuer said it was a total loss on the 7th of June, he only said it was a total loss because he contended that there was no such reasonable prospect, he thought the monsoon would break up the vessel, and that no prudent man would expose her to the chance of that.

I pass, my Lords, from that to the consideration of the other objection which has been urged against this interlocutor, and that objection is this, that the learned judges find as a matter of fact that the underwriters did not accept the abandonment. It is urged that in the circumstances of this case the underwriters must, as a matter of law, be held to have accepted the abandonment, and two or three cases were brought under your Lordships' notice to support that contention. As I pointed out in the course of the argument, it seems to me that if it were a sound proposi-

tion that in certain cases the underwriters must as a matter of law be held to have accepted the abandonment, it is obvious that you could not apply that law to a particular case without knowing what the circumstances of the case were, and you must go into the facts of the case in order to ascertain that. But, my Lords, in the present case there is nothing on the record, to which alone the House can look, to shew that there was any state of things such as would induce the conclusion of law that the underwriters had accepted the notice of abandonment. All that is said is that Captain Burns took possession of the vessel and that she was floated and towed to Bombay and there docked and then undocked, and lay in the harbour. That is all that is said, and that is quite consistent with all that being done by Captain Burns as the agent for the underwriters acting as salvors. All these are acts that might very well have been done by a salvor as well as by an underwriter who had accepted abandonment. Therefore, there is nothing upon the face of that statement which would warrant your Lordships in saying that that gives rise to a conclusion of law that the underwriters had accepted the abandonment.

The cases which have been cited I think fail to establish the proposition for which they were cited. In *Hudson* v. *Harrison* (1) there was a special case before the Court, and the question was a general one, whether there had been a total loss. Various questions arose in that case with regard to whether there had been a total loss, and incidentally this question of abandonment, and of acceptance of it, arose. Chief Justice Dallas said, "The assured immediately gave notice of abandonment, and called a meeting of the underwriters, which three of them attended, and authorized the plaintiffs to act for the benefit of all concerned, taking no other step till after an interval of two months. That the captain acted for the benefit of all concerned is clear, from the testimony of all the witnesses; but, though he did act for the benefit of all concerned, if the insurer has a right to insist on a legal objection, he must have the benefit of that objection. But has he such right in this case, or has he been bound by his own acts or the acts of others? The law is, that the assured shall abandon in reasonable time, that he may not lie by to see whether it may be more to his interest not to abandon; he must, there-

(1) 3 B. & B. 97.

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fore, in reasonable time (and what is reasonable time is a matter of law for the decision of the Court) give notice of abandonment." Then, my Lords, the learned judge goes on to discuss what is a reasonable time for that purpose: "Here, the earliest notice of abandonment was given, but if the law were to compel the assured to give the earliest notice of abandonment, and at the same time allow the underwriters to lie by and afterwards refuse to accept it, there would be no mutuality of obligation between them. The question, therefore, is, whether the underwriters, by lying by in the present instance, have not induced the assured to believe that the abandonment was acquiesced in." My Lords, there can be no such question in this case because it was admitted in the argument more than once, that the underwriters distinctly repudiated the abandonment and said they would not accept it. Therefore, the very matter upon which the Lord Chief Justice relied in *Hudson* v. *Harrison* is absent from the present case. In that case the notice was given in December, the insurers were called together, and, after having done nothing during nearly three months, they interpose just before the sale takes place. It is obvious enough that if the underwriters act in such a way as to induce the owner to believe that they have accepted an abandonment, and the owner's position is thereby altered for the worse, it may very well be as a matter of law afterwards that the underwriters shall not be allowed to say (for it comes rather by way of estoppel) that they did not accept it. They are acting as if they did, and they have led the owner to suppose that they did, and the owner has been damaged or his position altered for the worse by that.

There were two other cases referred to, the substance of which I think I can state to your Lordships. One was the case of *Provincial Insurance Company of Canada* v. *Leduc* (1). There the vessel was salved by the underwriters, and there again there was no repudiation of acceptance nor was there anything leading the owner to understand that they were acting as salvors. The passage of the judgment which is material for this purpose is (2):— "Their Lordships are of opinion that the acts of the defendants, by their agent, McGregor, in regard to the vessel after notice of abandonment, and especially their repairing the vessel and retain-

(1) Law Rep. 6 P. C. 224. (2) Law Rep. 6 P. C. at p. 239.

ing it in their possession, from the time when it was raised up to the time of their libelling it in the Vice-Admiralty Court, without repudiating that notice or informing the plaintiff as to the character in which they were acting, were evidence of an acceptance of the abandonment." That of course as it stands goes but a very little way. The word "evidence" is used; but I daresay it might well be held in certain cases, if the acts of the underwriters were strong enough for the purpose, that it was not only evidence but that it was conclusive evidence, and that a judge might very properly tell a jury that if they thought the underwriters had acted in this way without repudiating the abandonment and led the owner to believe that they had accepted the abandonment, they ought to find that the underwriters had accepted the abandonment. I can quite conceive that; although I do not think that this case which I have been referring to went so far as that.

But, my Lords, there is another case in the American Courts which I think did go as far as that—it is the case of *Peele* v. *Merchants Insurance Company* (1). The vessel was cast upon the rocks, lost and bilged. The insurers were told by the underwriters, after they had given notice of abandonment, not to let their agent intervene in the matter. The underwriters' agents took possession of the vessel and the Court said that any act which can only be justified under a right derived from abandonment is decisive evidence of acceptance. I think your Lordships would hold that to be perfectly good law, that is to say, if the underwriter had done an act which can only be justified on the supposition that he had accepted the abandonment, that is decisive evidence that he had accepted the abandonment. But, my Lords, applying that to this case, the acts done by the underwriters are referable to either one of two characters, either in the character of owners of the ship they having accepted the abandonment and therefore taken the risk of the ship and the property in the ship upon themselves, or in the character of salvors, in which case of course no inference of acceptance would be drawn. The evidence shews that they took upon themselves the character of salvors, not the character of owners. It is true that in that character they

(1) 3 Mason, 27.

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got all the advantage they could have got if they had accepted the abandonment; but I do not think it follows from that that they did accept the abandonment. They expressly repudiated the idea of it and did acts which were quite consistent with their acting as salvors only.

Therefore, to sum up all these matters, it seems to me that the question whether the underwriters accepted the abandonment or not is a question of fact to begin with, but the circumstances of the case may be such that a jury may be told as a matter of law, and properly told, that if they think the underwriters have done certain acts which are consistent only with their having accepted the abandonment, then they ought to find that the abandonment has been accepted. And, further, I think it may well be that, although they have not really accepted the abandonment, they may have so acted that a judge may very properly tell a jury that, having acted in a certain way and having thereby altered the rights, the condition, and the interests of the owner, although they have not accepted the abandonment and the jury ought to find accordingly in point of fact,—yet, in point of law they ought to be dealt with as if they had accepted it. I think that those are the propositions which belong to a case of this kind. But subject to those exceptions I think that from first to last the question whether the underwriters have accepted the abandonment or not is a question of fact. I have no doubt that the Court of Session in their finding intended to state this as a matter of fact. They found as a matter of fact that the underwriters did not accept the abandonment. I can hardly understand how your Lordships can be asked, without going into the facts of the case, but confining yourselves to what appears in the record, which according to the case of *Mackay* v. *Dick* (1) is what alone your Lordships have to look to,—how your Lordships can be asked to send this case back to the Court of Session to tell that Court to discriminate whether they meant this finding as to the abandonment as a pure matter of fact or whether they intended it to be a mixed matter of law and fact. The findings are, I think, reasonably distinct and reasonably clear and precise. I think your Lordships can have very little doubt as to the real intention of the Court in the conclusion

(1) 6 App. Cas. 251.

which it came to, and to refer it back to the Court would be only to ask the Court to put in more precise language those matters which they intended to put, and may I think be reasonably understood to have put, in the interlocutor as it stands.

I am, therefore, of opinion, my Lords, that the interlocutor ought to stand as it is and that the appeal ought to be dismissed with costs.

LORD BLACKBURN :—

My Lords, I am of the same opinion.

The action here was commenced originally before the sheriff of Lanarkshire, and then pleadings were taken, the record was made up, the proof was led, and the sheriff pronounced his interlocutor upon it. From that there was an appeal to the Court of Session. The Court of Session unquestionably had before them all the record and all the proof, and upon both law and fact they might review what the sheriff did, and might decide upon it, coming perhaps to a different conclusion of fact from that which the sheriff had arrived at upon the same proof that was before him. No further proof was added, and it was solely upon that that they were going. Now I take it that as the law stood before the Judicature Act of George IV., which has been so much mentioned, when the Court of Session had decided upon the case, it would have been open to any of the parties to come to the House of Lords and ask this House to decide upon the whole matter, taking the proof before the House of Lords, and the House drawing the inferences of fact from the proof and deciding upon both the law and the fact. But that was changed by the Act of George IV., and it was enacted that in those cases which originated in an inferior court—the sheriff's court or any other inferior court—it was no longer to be so. This is the state of the law upon that point. I do not inquire whether the changes in the forms of pleading in the inferior courts may not have made that state of the law no longer necessary. That statute has not been repealed, and therefore the existing state of the law stands as regulated by the statute of George IV.

Now, in the present case, one has to see whether the conditions

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of that statute have been fulfilled, and whether all has been done that is required by it, and whether the matters now sought to be brought before this House are questions of fact, which, if the interlocutor of the Court of Session has properly and sufficiently stated them, are to be completely binding upon this House, or whether there is a matter of law involved. If there is a matter of law no doubt, according to the terms of the statute, the Court of Session ought to have separated it from the facts and raised it separately; and if it appeared upon the record that there was a matter of law which ought to have been separately raised, I suppose the proper course would be to remit the cause to the Court of Session that they might raise that which they ought to have raised before. But unless it appeared upon the record, upon the issues joined, or pleadings between the parties, that there was such a matter of law, the interlocutor must stand as it is. I do not enter further into that matter, because so far as my opinion goes, I fully explained my views upon it in the case of *Mackay* v. *Dick* (1), which was decided in this very year, and my noble and learned friend opposite (Lord Watson) then entered into some exposition of what the record was, in which I quite agreed, and in that case the conclusion which the House came to was that there was no need to remit it.

Now, my Lords, let us see how the matter stands here. The record does not state it very artificially, it embarrasses us a little in reading it at first owing to the way in which it is drawn. When the suit first commenced the condescendence stood thus—in fact as it stands at present for the first few lines: "On or about 23rd May 1879 the said vessel, while prosecuting a voyage" encountered a storm and so forth, and was driven ashore "where she was abandoned and became a wreck." There the original statement in the condescendence stopped. The answer was, "Admitted that the ship stranded, about the date stated, on the beach to the northward of Reri Fort. Quoad ultra denied." Then comes the statement of the defenders as they gave it. "Explained that the ship was run ashore with the view, as the master avers, of saving life, and that she is little if at all

(1) 6 App. Cas. 251.

injured, and can and will be got off the beach within a reasonable time without her sustaining material damage." That I understand to have been the original answer. Then the defender was allowed to add a further statement, and I think rightly enough. The appeal against the sheriff's interlocutor giving that permission has not been persisted in, and one need say nothing further about it, except that the thing was done. He was permitted to add this, and it stands now thus—"Explained further that recently said ship has been floated and taken to Bombay, where she now lies little injured." Upon that the statement in the condescendence was added to, and I will now read the new bit which was subsequently added. "With reference to the defender's additional statement in answer, it is explained that on or about 15th October 1879, the said vessel was taken possession of by Captain Burns of the Glasgow Underwriters' Association, by the instructions or on behalf of the defender and of the underwriters upon the said policy of assurance, which had previously expired on or about 22nd September 1879." I may observe that it is in my mind quite immaterial that before these things happened the policy, which was a time policy, had run out by efflux of time. If the vessel was lost whilst the time was running, or if the injury was sustained then, it may very well be proved by evidence subsequent to the date of the policy having expired. The question was, Was there while the policy was current a loss such as to make the underwriters responsible for it? The condescendence goes on: "The said vessel was floated by the said Captain Burns on or about 16th November 1879, and was towed to Bombay under his charge on 3rd December 1879, where she was docked by his instructions, and certain repairs were executed upon her by his orders, and that the said vessel was undocked on or about 13th December, and moored in the harbour where she is now lying at the risk of the defender and the said underwriters." Then the condescendence adds at the conclusion: "The defender and the underwriters thus accepted the pursuer's abandonment." This is met in the answer by saying, "The pursuer's statement in answer is denied, subject to the following explanations." I need not go into the explanations. The statement which I have read

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as being the pursuer's statement, seems to me to state facts not in my mind sufficient to justify an inference of law that there was an acceptance of abandonment, but facts which were proper to be considered as evidence as to whether there was an acceptance of abandonment or not in fact.

Now as to the cases which have been cited I quite agree with what has been said by the noble and learned Lord (Lord Penzance) that they do shew that facts such as these would be evidence proper to be considered as to whether in point of fact the defender did accept the abandonment or not. If what he did operated as a transfer of the ship to him, quite irrespective of the question as to whether the ship was injured more or whether she was injured less. If those interested in the ship chose to say to the underwriters, We abandon her to you, and if the underwriters accept the abandonment, although in fact the ship had not had a pennyworth of damage done to her, they may have made an extremely good bargain, yet the ship has become theirs. If they have accepted in fact (and this is evidence of their having accepted in fact) it would be so. They would have to pay the policy of insurance, that is the insured value, and they would have the ship. The statement in the defender's answer explains these things in a way which goes to shew that they did not accept the abandonment at all. Which of the two is true I do not inquire, but each side has stated evidence which would tend to shew that there had been, or that there had not been, an acceptance in fact.

Now, my Lords, I do not deny that there may be a case in which the underwriters might not have really intended to accept in fact and yet they might be precluded—barred by personal exception I think is the Scotch phrase—from denying that they had accepted; and probably the effect there would be the same in law as if they had accepted. But then I must say no such case is raised here. If such a case had been raised, I think it would have been right and proper for the Court of Session when they came to make their interlocutor to say, We find as a matter of fact that such and such things arise, we find as a matter of law that, although those things arise, and although the owner has contended that they operate as a bar by personal exception to

the underwriters denying that they arise, we think they do not. Or they might have found as a fact, We find that such and such things arise, we do not find that the underwriters accepted the abandonment as a matter of fact, but we do find as a matter of law that, having done as much they did, they must be bound by it and must be taken to have accepted; I think so to find in such a case would be very right and proper. But then, when I read this condescendence and answer, I observe that there is nothing of the sort raised here; there is not a pretence for it; there is not a word in what is set out either in the condescendence or in the answer, in the statement of facts, which in the least shews anything which should amount to an estoppel, or personal exception, binding them to act as if they had accepted, when in point of fact they had not. Therefore, the only thing that could be properly found upon that part of the case was, had they accepted or had they not as a matter of fact? The sheriff finds that the underwriters did not accept the abandonment. The Court of Session finds that the underwriters did not accept the abandonment. It certainly seems to me that your Lordships would act directly in the teeth of the Scotch Judicature Act if you were to say that you will not take that as a finding of fact which is to be binding upon this House without inquiring into the evidence which led to it.

Now comes the other question, in which there is more appearance of substance than in the former. The same facts which I read as to the abandonment are also material as to the other point. The law I take to be clear enough that where a ship has been by the perils of the sea (though not actually destroyed so that it is still a ship), so damaged and placed in such a position that the owner of the ship cannot use her again as a ship unless he incurs considerable expense, or so situated that he is deprived of his control over her and cannot use her unless he can get her out of that situation, which would generally both occupy time and involve expense in repairs and otherwise—in such a case I take it the rule is, as I have always understood it for a great many years as it was expressed by Mr. Justice Maule in the case of *Moss* v. *Smith* (1). He put it thus: We are dealing with a mer-

(1) 9 C. B. 94.

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cantile matter, we are dealing with mercantile law, and where a thing cannot be practically done in a mercantile contract, we think it cannot be done at all: if you cannot practically get a ship out, it is impossible to get her out; she is lost because she must stay there. And, further, he goes on to say in mercantile matters what cannot be done without an expense in doing it which would be unreasonable in proportion to the object, is to be considered as impracticable and impossible; and he gives the celebrated instance that a sixpence dropped into the water, which you can see lying at the bottom at a depth of twenty feet in clear water, is totally lost because it would cost much more than the sixpence to get it up, it would cost more than it was worth. That is an apt illustration of the rule applying to such cases. It is called a "constructive total loss." I do not quarrel with the phrase although it is not perhaps quite correct.

Now we have to see how time enters into the question. Supposing the notice of abandonment was at the time when it was given justified on the ground that at that time a reasonable person would think, and would reasonably and properly act upon the notion, that the ship situated as she was was then totally lost within Mr. Justice Maule's rule, because he must have waited longer and spent more than he could reasonably have done before he could get the ship back to be a ship — there is a question raised upon which I have an opinion. I have both expressed it in this House, and formerly I have also, I think, in advising this House expressed an opinion upon the matter as far as regards English law. There is a considerable difference between the law of England and the law of some foreign countries, France in particular. In the law of England where notice of abandonment is given and the circumstances are such that the man may reasonably give it, but the underwriter refuses to take it and afterwards an action commences, if in the interim that which the man who gave the notice of abandonment reasonably and properly believed to be a total loss turns out to be not a total loss, it cannot be held that it is. For instance, if a ship has actually been captured and is apparently going off into the enemy's hands, and thereupon notice of abandonment is given; it is

perfectly good as matters then stand. But an English frigate meets the ship and recaptures her and brings her back before action is brought, then you must take it that it is not a case of constructive total loss in law at the time when the action is brought; and, as Lord Mansfield said long before, in *Hamilton* v. *Mendes* (1), it is a rule of the law of insurance in England that where a thing is safe in fact no artificial reasoning should be permitted to say that it is not. The case is quite different if the re-capture puts the ship in such a position that the owner cannot get her without paying more than she is worth, that is the case of *Holdsworth* v. *Wise* (2). But the law in foreign countries is different—certainly in France, where it depends I think upon express enactments in the famous Code of the Marine, the law is different altogether. The point seems to be a moot point not yet finally decided in Scotland, and I am not going to express an opinion as to how it would be in Scotch law. I merely observe that there seems to be a point which might be raised, and which if it were well raised now would be a very proper question for the House to decide upon, whether or no you ought by the law of Scotland to look at what was really the state of things (with light thrown upon it by what happened afterwards) on the 7th of June, when notice of abandonment was given, and whether you could not as in England say to the owner, Though on the 7th of June the state of things was such as gave you a right to abandon the ship, yet before the 1st of October, when you commenced your action, that state of things was changed and you had not the right to abandon.

Now when the case came before the sheriff he, after having stated the earlier facts, proceeds to find this: "Finds that shortly after the stranding of the *Krishna* the south-west monsoon began upon the coast of India and continued till the end of September or beginning of October, and that during its continuance it was impossible to get the *Krishna* afloat. Finds that, in August and September" (this is to be noticed) "and at the date when this action was raised the *Krishna* was not in any risk of sustaining further injury where she lay, and that, regard being had to the

(1) 2 Burr. 1198. (2) 7 B. & C. 794.

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usual course of the monsoon, there was then a reasonable prospect of her being got off the sandy shore where she lay without greater expense than a prudent uninsured owner would reasonably incur: Finds therefore that there was not at that date a constructive total loss of the ship such as to entitle the pursuer to abandon her to the underwriters." He does not say that he thought that there had been a constructive total loss on the 7th of June when the notice of abandonment was given, though he certainly leaves it open to be contended that it was so, putting his decision upon a point which if it arose here this House ought to decide; but it does not arise here, and certainly I am not going to decide it without an opportunity for both argument and consideration, for it may be an important question.

Now that being the point which the sheriff had decided when the case came to the Court of Session, not one additional word either upon the record or upon the proof is brought forward. It all stands as it was before, and then after that the finding of the Court of Session is this. After finding "that the underwriters did not accept the abandonment," upon which I will say no more, it proceeds: "Find that the pursuer brought this action for indemnification of his loss upon the 1st day of October 1879: Find that, shortly after the stranding of the *Krishna* the south-west monsoon began upon the coast of India and continued till the end of September or beginning of October, and that during its continuance it was impossible to get the *Krishna* afloat: But find that there was on the 7th of June, and continued thereafter to be, a reasonable prospect of her being got off the sandy shore on which she lay without greater expense than a prudent uninsured owner would reasonably incur: Find, therefore, that there was not at that date, a constructive total loss of the ship." They do not say in express terms that there was not a constructive total loss after that date, for the obvious reason that the sheriff had found that there was not a constructive total loss after that date, and what they were finding was what he had not found. The question of law intended to be raised did not arise, for there was not a total loss, constructive or otherwise, on the 7th of June or at any date after that—that is what they were meaning to find.

Now upon that this complaint has been made by the appellant. It is said, the cause ought to be remitted to the Court of Session for, non constat for all they say, the ship might have been got off the shore and carried to Bombay for a very reasonable expense, indeed at a very small expense, and yet it might be that the *Krishna* had been so damaged upon the shore that she would not be repairable except at a great expense, and if that great expense and the expense of carrying her to Bombay exceeded the total value of the ship she would have been constructively totally lost on the 7th of June. That is the way in which I think it is put. But I think, if the House were to remit the case to the Court of Session upon that state of things, there would be a great risk of miscarriage, because the Court of Session would never believe that we were doing anything so absurd. To meet the point which the appellant raises here, it seems to me that if we were to remit it all the Court of Session would have to do in order to make their interlocutor perfectly clear would be to add a few words to their finding, to say "that there was on the 7th of June, and continued thereafter to be, a reasonable prospect of her being got off the sandy shore on which she lay and of her being thereafter repaired without greater delay and expense than a prudent uninsured owner would reasonably incur." With the addition of those few words there could not be the least doubt that the interlocutor would properly find that in point of fact there was not a constructive total loss, that there was no total loss at all; and if we were to send it down to the Court of Session I think the risk would be that they could never imagine that the House was sending it down merely for the purpose of inserting those words. That the Court of Session would without hesitation insert those words if required, is, to my mind, looking at the record, quite certain. The next time they are making an interlocutor I think it would be better for them to remember that objections of this sort may be made, and to express themselves a little more fully in the words they use. But when we look to the record and see what the allegations on both sides are, and what had been the finding of the sheriff from which the appeal was brought—taking all these together—I think we ought to construe the interlocutor as mean-

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ing exactly what it would mean if those few words which I have mentioned had been added.

An attempt was made (I think it was a very desperate one) to argue that; inasmuch as in the Act of the 6 George IV. the legislature had referred to a special verdict, which I understand to mean a special verdict in England, as fixing the facts, therefore the interlocutor which was to do this—to state the facts—was to state them with all the minute particularity required in a special verdict; in short that an interlocutor of the Court of Session was to be open to a special demurrer, as it used to exist in my early days. I can only say that I do not believe the legislature intended anything of the sort, and I think the decision in *Mackay* v. *Dick* (1), the only case which I believe has ever come before this House on the point, gives us the real right rule, namely, that when the Court of Session has said, We find certain facts, we are to take those facts as conclusively and properly found; but if we see upon the record that there was anything really in dispute involving a question of law, if the Court of Session have left that open to us we will decide it, if not, we will remit it down to that Court for them to shew distinctly how it was. In the present case I do not think that there is the least occasion to do so.

LORD WATSON:—

My Lords, if this case had come before us on the merits, and we were free to deal with it in the same way as it was competent for the Second Division of the Court of Session to do, a great many interesting questions both of law and fact might have arisen; but it is admitted to be one of those cases to which the provisions of the 40th section of the Scotch Judicature Act directly apply, and therefore the contention at the bar is necessarily confined to an impeachment of the interlocutor of the Second Division upon the more limited grounds which are permitted by that statute.

Upon the general scope and purpose of that Act I desire to say nothing, because these have been commented upon in a judgment of this House within a very recent date, in the case of

(1) 6 App. Cas. 251.

Mackay v. *Dick* (1). I will only add this, that the contention seems to me to be entirely unwarrantable that the Court, in framing their findings of fact under that 40th section, are bound to observe the very strict rules which are applicable to the special verdict of a jury in England. I think that all the Court are bound to do is to find, either negatively or affirmatively, upon those propositions in point of fact which are to be found in the record, and upon which the parties rely in their contention at the bar. I say so advisedly, because I am not prepared to hold that, if the parties do not insist upon facts material to their case in the Court below, they shall as a matter of right be entitled to come here and insist that the case shall go back to the Court of Session to be tried upon grounds which might have been competently urged at the bar of that Court, when the case first came before it, but which were not then urged.

In this interlocutor two sets of findings are impeached; that finding which refers to the alleged acceptance of abandonment by the underwriters, including the defender, and the other finding which relates to the facts upon which the Court base their conclusion in point of law to the effect that there had been no total loss.

Now, my Lords, I am not at all prepared to suppose that in no case of acceptance of abandonment by the underwriters can facts arise which will raise a proper question of law for the determination of the Court; but I think that, when such a case occurs, the facts raised must be of the kind which have been referred to by my noble and learned friend opposite (Lord Blackburn). It would have been quite competent here for the pursuer in the action to set forth some specific fact, such as the sale of the vessel by the underwriters or their agent, and to found upon that as in law being a conclusive answer to the contention of the defender: that would be raising a plea for the consideration of the Court of the nature of estoppel, or a "plea in bar" as it is termed in the language of the law of Scotland. But there is no case of that kind indicated upon the record. There are a few specific facts averred, and after setting forth those specific facts, the third

(1) 6 App. Cas. 251.

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article of the condescendence concludes with the general averment that "the defender and the underwriters thus accepted the pursuer's abandonment." These are not facts which could have been founded upon as per se raising any question of law, but it was said that, followed by that general averment, they must be looked upon as raising a question of law and not a question of fact. My answer is that the whole averments when taken together do not raise any question of law, and that it is not necessary that the Court of Session in complying with the provisions of the 40th section of the Judicature Act should specify the chain of circumstances or the chain of evidence from which they come to a conclusion in point of fact; and accordingly, looking to the terms of the record and the course which this case has taken in the Courts below, I have come to be of opinion that the Court have decided the only issue submitted to them, being an issue of fact and not of law, and accordingly that their finding to the effect that there has been no acceptance of abandonment is not open to impeachment at your Lordships' bar.

My Lords, the other matter I confess is attended with more difficulty. It is said that the findings which are followed by the finding in law, "that there was not at that date a constructive total loss of the ship," are defective; that there ought to have been a substantive finding upon the point whether or no the ship was capable of being repaired on such reasonable terms as would have led a prudent uninsured owner to repair her. Possibly, in order to strict logical sequence, some finding of that sort should have been introduced. But then it is necessary to see whether that really formed an essential part of the case as raised upon the record or as pleaded by the pursuer in this action. My Lords, I cannot say much in favour of the record in this case. It is exceedingly loose. It begins by asserting that the vessel by being stranded upon the beach at a particular spot thereby "became a wreck," and then, after alleging that there was a notice of abandonment and a taking of possession of the vessel, there is a further allegation to the effect that there was thus an acceptance of the abandonment. But what is meant by those words, "a wreck?" Do they mean that the vessel was wrecked in the sense of having

been run ashore, it being possible to get her afloat again either then or within a reasonable time, or do they mean that she had been converted from a vessel capable of being navigated, with slight or considerable repair, into a mere battered hull? I cannot read the statements of the pursuer, in that part of the record which relates to the subsequent floating of the vessel, as being reconcilable with the notion that she was utterly shattered by being beached. From the record itself I draw the inference that the case which was intended to be made, and which was made under that very general statement, was this, that owing to the locality where the vessel was run upon the beach, and owing to the bad weather at that time of the year, and the certain continuance of the monsoon for a considerable period, it was impossible to ascertain the state of the vessel's hull or what her injuries were, and that it was impossible to tell whether she would be got off or whether she would be got off within a reasonable time; that in fact it was impossible to speculate at that date with any degree of certainty that she ever could be got off at such an expense as a prudent man would incur. That is the case which was dealt with by the learned judges in both the Courts below, and that satisfies me (and it is perfectly competent to refer to their judgments for the purpose) that the pursuer so understood his own record, and that the Court in negativing, as they have certainly done, these grounds of action, have negatived the contention that was laid before them. I think that when they find, that on the 7th of June there was a reasonable prospect of her being got off the sandy shore on which she lay, without greater expense than a prudent uninsured owner would reasonably incur, that finding must be construed in reference to these views of the record, and as necessarily implying that the vessel was capable of being repaired; because no prudent uninsured owner could have thought of salving a vessel which was utterly incapable of repair.

I desire to say that if the pursuer intended to raise the point, upon which he now complains that the Court of Session have pronounced no finding, it was his duty to do so, by making a distinct and articulate statement of that ground of action, instead of concealing it under such general and figurative expressions as that

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the vessel became a wreck. There was quite sufficient disclosed, in his own pleading, and still more in the pleadings of the defender, with regard to this vessel having been got off and dealt with as a floating vessel and repaired in dock, to have made that duty peculiarly incumbent upon him in the present case. My Lords, agreeing as I do with the views which your Lordships take not only of the law but also of the right construction of the pleadings in this case, I concur in the judgment which your Lordships propose to pronounce.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Agents for appellant: *Lyne & Holman.*
Agents for respondent: *Hollams, Son, & Coward.*

[PRIVY COUNCIL.]

ERNEST CHARLES ELLIOTT . . . . DEFENDANT;

AND

WILLIAM TURQUAND . . . . . PLAINTIFF.

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Nov. 8, 9, 10.

ON APPEAL FROM THE SUPREME COURT AT JAMAICA.

Bankruptcy Act, 1869, *s.* 39—*Mutual Dealings—Set-off—Agent's Authority not revoked till Notice of act of bankruptcy.*

The object of sect. 39 of the *Bankruptcy Act*, 1869, is that where there are mutual accounts a secret act of bankruptcy should not stop the currency of those accounts; the existence of mutual dealings and accounts protects the credits and debts on each side from the operation of the act of bankruptcy until notice of it. The exact date at which a mutual account is to stop must depend on the circumstances of the case and the nature of the credits, but may and ought to be taken at least up to the date when the person claiming the benefit of sect. 39 has notice of an act of bankruptcy.

Where authority had been given previous to an act of bankruptcy by the bankrupts to the defendant in the course of mutual dealings to receive the purchase-money of their estate and to place it to account, and such authority had been acted upon before notice of an act of bankruptcy:

Held, that such authority was not revoked by the act of bankruptcy; that the payment thereof to the defendant was a rightful payment; that being so received it became a debt and an item in the account between him and the bankrupts before notice of any act of bankruptcy, and that the defendant was entitled to set off against it, in an action brought by the trustee in bankruptcy, the debt due from the bankrupts to him.

APPEAL from a judgment of the Supreme Court, Aug. 25, 1880, discharging a rule nisi for setting aside a judgment entered for the respondent in an action brought by him as trustee of Cottam, Mortan & Co., against the appellant to recover the sum of £560 and interest as money received to the use of the respondent and for entering a judgment for the appellant, on the ground that the appellant had no right to set off or appropriate the £560 against a larger debt due by the bankrupts to him, either under the 39th, 94th, or 95th sections of the Bankruptcy Act,

* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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1869, because the authority of the appellant to receive the £560 had been determined by the bankruptcy.

The facts of the case appear in the judgment of their Lordships.

The proceedings in the action were as follows:—

The action was brought on the 12th of December, 1879, the declaration claiming the £560 as money had and received by the appellant as trustee as aforesaid to the use of the plaintiff, and also as upon an account stated by the appellant in respect thereof. The appellant filed four pleas, (1) denial of respondent being trustee as alleged; (2), never indebted; (3), authority from Cottam, Mortan, & Co., before the alleged bankruptcy, to appellant to receive £560, and that without notice of any act of bankruptcy committed by them, the appellant had received the said sum as their agent and not for the respondent, but for them, and in due course of appropriation placed the same to their credit in account, and that after such credit the said firm were still indebted to him; (4), that prior to the alleged bankruptcy and without any notice of any act of bankruptcy, appellant and Cottam, Mortan, & Co. had mutual debts, credits, and dealings, and appellant being thereunto authorized, received for their use the said sum of £560, and without notice of any act of bankruptcy placed the same to their credit in the account of their mutual dealings in respect of which after such credit the firm remained indebted to the appellant. The respondent joined issue on these pleas and filed a replication to the 3rd and 4th, that the authority to receive the £560 had been determined before its receipt, and a further replication to the 3rd plea that the agency of the appellant had been determined before money placed to credit in account of Cottam, Mortan, & Co. The findings and verdict of the jury, are stated in the judgment of their Lordships.

Mackeson, Q.C., and *Pollard*, for the appellant, contended that the judgment entered for the respondent should be set aside and entered for the appellant. The receipt by the appellant of the money and his appropriation of it by placing it to the credit in general account of Cottam, Mortan, & Co. in the account of their mutual debts, credits, and dealings, was a dealing with them

protected by sub-sect. 2 or sub-sect. 3 of sect. 94, or sub-sect. 1 of sect. 95 of the Bankruptcy Act of 1869 (32 & 33 Vict. c. 71). If the transaction fell within any one of the sections 94, 95, or 39 of that Act the £560 never became the property of the respondent and he cannot sue for it. The appellant's authority to receive the money and appropriate the same in account existed in fact and in law at the date of such receipt and appropriation. The mere commission of an act of bankruptcy by Cottam, Mortan, & Co. did not operate as a revocation of the authority given to the appellant, who had received and placed the money to the bankrupts' credit in account without notice of any act of bankruptcy. The mutual dealings between the appellant and the bankrupts were of such a nature as to entitle him to avail himself of sect. 39 of the Act of 1869 as against the respondent. Reference was made to *Ex parte Duignan, In re Bissell* (1); *Hawkins* v. *Whitten* (2); *Ex parte Pillers, In re Curtoys* (3); *Coles* v. *Robins* (4); *Bittleston* v. *Timmis* (5); *Kynaston* v. *Crouch* (6); *Naoroji* v. *Chartered Bank of India* (7); *Pearson* v. *Graham* (8); *Booth* v. *Hutchinson* (9); *Rose* v. *Hart* (10). [SIR BARNES PEACOCK referred to *French* v. *Fenn*, cited in *Rose* v. *Hart*, in which the sale as well as the receipt of the money took place after the bankruptcy.] *Smith* v. *Hodgson* (11).

Rigby, Q.C., and *R. T. Reid*, for the respondent, contended that the £560 was the money of the respondent, and that the appellant received it to his use. The question is, did this case come within the exceptions allowed in the Act of 1869 to the rule whereby things vest in the assignee by relation from the act of bankruptcy. There was no contract under which the appellant had any lien as against the bankrupts on the proceeds of the estate sold in respect of the debt against which he seeks to set it off. The credit in this case was not given before the bankruptcy, and the bankruptcy operated as a revocation of the appellant's authority. The frame of the Act is this, that primâ facie every

(1) Law Rep. 6 Ch. Ap. 605.
(2) 10 B. & C. 217–221.
(3) 17 Ch. D. 658.
(4) 3 Camp. 183.
(5) 2 D. & L. 817.
(6) 14 M. & W. 266.
(7) Law Rep. 3 C. P. 444; 18 L. T. (N.S.) 358.
(8) 6 Ad. & E. 899.
(9) Law Rep. 15 Eq. 30.
(10) 2 Sm. L. C. 296.
(11) 4 T. R. 211.

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act of the bankrupt is invalid after the act of bankruptcy. The sections contain all the exceptions to that rule, and there can be no valid disposition after an act of bankruptcy unless such act is protected by one of these sections. Reference was made to sect. 39; *Tamplin* v. *Diggins* (1); Williams on Bankruptcy, p. 275. The authority here was merely that the appellant might get in the £560, provided the bankrupts did not otherwise dispose of it, which they had done in favour of the respondent by the bankruptcy. That is not a giving of credit protected by sect. 39. That section relates only to mutual dealings and accounts prior to the act of bankruptcy, except as regards such credits previously given as may afterwards terminate in debts. In order that the transaction may be protected under sect. 39 it must also come within sects. 94 and 95. Reference was made to *Coles* v. *Robins* (2); *Bittleston* v. *Timmis* (3); *Astley* v. *Gurney* (4); *Young* v. *Bank of Bengal* (5); *Parker* v. *Smith* (6); *In re Waugh, Ex parte Dickin* (7); *Ex parte Pillers, In re Curtoys* (8).

Counsel for the appellant were not called on to reply.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal arises in an action brought by the respondent, the trustee in bankruptcy of Messrs. Cottam, Mortan, & Co., West India merchants, to recover from the appellant, who was their agent in Jamaica, the sum of £560 which was paid to him by a person of the name of MacCormack, as an instalment of the purchase-money of the Savoy estate in Jamaica. The defence to the action rests on a claim to set off against this sum of £560 a larger amount due to the appellant (the defendant) from the bankrupts, and the question in the appeal arises on that claim.

The facts relating to the general course of dealing between the parties are shortly stated by the Chief Justice who tried the action.

(1) 2 Camp. 311.
(2) 3 Camp. 183.
(3) 2 D. & L. 817; 1 C. B. 389.
(4) Law Rep. 4 C. P. 714.
(5) 1 Dea. 622; 1 Moore, P. C. 158, 164.
(6) 16 East, 382.
(7) 4 Ch. D. 524.
(8) 17 Ch. D. 658.

His statement of them is this: "For several years previous to the bankruptcy the defendant had acted as the agent of Cottam, Mortan, & Co. in respect of Savoy and Yarmouth estates, and also of their shipping and general business. He financed the estates, consigning the produce to the firm in London, and drawing on them for the expenses of management by means of bills which were discounted by the Colonial Bank in this island. As of the 9th of May, 1878, the defendant was in credit on account of Savoy in a small balance of £29 2*s.* 9*d.* As of the 30th of June of the same year he was apparently in debt on account of Yarmouth in the sum of £73 3*s.* 3*d.*, but this included three bills drawn by him on and accepted by the firm of £200 each, which were subsequently protested for non-payment, amounting in all to £600, and for which he is liable to the bank, who are the holders. There is also a balance due to him, exclusive of the bills, for disbursements on account of the subsequent working of the estate (which is now in the Incumbered Estates Court) to the 6th of September, amounting, after deducting the £73 3*s.* 3*d.* and a credit of £30 for logwood, to about £179. Upon the general account the defendant appears to be a creditor to the extent of £400, of which he states that he has had to take up one bill for £200, and that on another for the like amount he is liable to the bank."

It appears from the course of business thus described that the defendant and the bankrupts had mutual dealings with and trusted each other. They trusted each other with credits which were likely to terminate, and in fact did terminate, in debts. Accounts were kept and rendered in the manner which is usual between West India merchants having estates in the West Indies, and their agents who manage those estates for them. The defendant advanced moneys, made disbursements, and became liable on bills for the bankrupts. It appears that the bankrupts at the time of the bankruptcy were indebted to the defendant upon the accounts both general and special, taking them together, in a sum far exceeding the £560. Some of the items of the accounts were actual debts, others were credits clearly of a nature within the 39th section of the Bankruptcy Act, which must and did end in debts; and it is not questioned that those debts were incurred by,

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and those credits given to the bankrupts, before the act of bankruptcy.

The facts relating to the particular sum in dispute may be shortly stated. The defendant was entrusted by the bankrupts with the sale of the Savoy estate. He was so employed, no doubt, as being their general agent in the island. The sale appears to have been completed on the 1st of October, 1877, by a conveyance of that date from Mr. Lambert, one of the firm, to Mr. MacCormack. On the back of the deed is found a receipt for the purchase-money expressed in the deed, viz., £1460. The receipt is signed by Lambert. From an expression in a letter of one of the bankrupts it may be gathered that the deed was executed as an escrow. Although the facts are not clearly stated in the evidence, it appears that, besides the estate, stock to the value of £600 was at the same time sold by the defendant on behalf of the bankrupts to MacCormack. An arrangement was made that £1000, part of the purchase-money of the estate and stock, should be paid at once, and the remainder by two instalments of £500 at intervals of a year. The first of these instalments, which, with interest at six per cent., was paid by MacCormack to the defendant, is the subject of this action.

On the 17th of August, 1878, the bankrupts in England filed a petition for liquidation by arrangement in bankruptcy. Their creditors met, and the Plaintiff was appointed trustee; his appointment bearing date on the 26th of September, 1878, at which time his title to the property of the bankrupts actually accrued. The payment of the £560 was made to the defendant by MacCormack on the 26th of August, 1878, after the filing of the petition for liquidation, which was undoubtedly an act of bankruptcy, but before the 26th of September, when the trustee was appointed, and the estate of the bankrupts became vested in him.

The general result of the evidence given at the trial appears in the facts which have been already stated. The learned Judge put three questions to the jury. The first was:—"At the time of the act of bankruptcy were Cottam, Mortan, & Co. indebted to the defendant upon their mutual accounts and dealings in a larger amount than £560 received by him?" The jury found

that they were. There is, therefore, as already stated, no question that the bankrupts at the time of the act of bankruptcy were indebted to the defendant in a larger amount than the £560. The second question was:—"Had the defendant at the time he received the money notice of an act of bankruptcy committed by them?" The answer was, "He had not." That also must be taken as conclusively found by the jury. The third question was:—"At the time he received the money was the defendant's authority from Cottam, Mortan, & Co. determined," and the answer is:—"It was." This question, it may be observed, assumes that there was an authority given by the bankrupts to the defendant to receive the instalments of the purchase-money from the purchaser; and from the facts that have been already stated, and which appear at more length in the evidence, their Lordships have no difficulty whatever in coming to the conclusion that the defendant had authority from the bankrupts to receive the money and to place it to the mutual account existing between them.

With regard to the finding of the jury that the authority was determined, it is plain that it was not a finding of any fact by them. It was merely the affirmance of a conclusion of law which had been drawn by the Chief Justice, and which he directed them to find as if it were a question of fact. The direction of a Judge upon that point, and the finding of the jury in conformity with it, afford the main ground upon which the Court held that the plaintiff was entitled to recover. The grounds upon which the Court so decided appear to be that the authority which had been given by the bankrupts to the defendant to receive the money was revoked and determined by the act of bankruptcy, that the title of the trustee had relation to that act, and that the defendant, therefore, could not avail himself of a set-off. Now at the time the defendant received the £560 he became accountable to the bankrupts for it, and if the bankrupts had the next day brought an action against him to recover it he might undoubtedly have set off the larger debt which they owed him. The question is whether he may not now do so against the trustee, notwithstanding the previous act of bankruptcy, it being found as a fact that at the time he received the money he had no notice of it. Their Lordships think that he may do so, and that the case falls within

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the 39th section of the Bankruptcy Act—the Act of 1869. The actual title of the trustee to the property of the bankrupt did not accrue until his appointment on the 26th of September; and though no doubt that title is for many purposes taken back by relation to the act of bankruptcy, the same statute which creates that artificial relation provides in effect that in certain cases the relation shall not take place. Amongst the cases for which it so provides is the class of cases where mutual dealings, mutual credits, or mutual debts exist; and as to such cases the effect of relation appears, by the legislation regarding them, to be neutralised and destroyed. Sect. 39 is this: "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt, notice of an act of bankruptcy committed by such bankrupt and available against him for adjudication."

It is observable that no time is mentioned in this section at which the account is to be taken. It has been argued that the account is to be taken to the time of the act of bankruptcy and not later, except as regards credits previously given which may afterwards terminate in debts. But the section is not so confined. The object was, that where there are mutual accounts a secret act of bankruptcy should not stop the currency of those accounts. In some of the former statutes the words, "notwithstanding a previous act of bankruptcy" are inserted. Although these words do not occur in the present section, their Lordships think that enough appears in the section from which an implication, equivalent to them, arises. The proviso at the end is, "but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt notice of an act of bank-

ruptcy." The proviso says nothing with regard to credit given by the bankrupt to such person. The insertion of this proviso shews that the substantive part of the section cannot be read as referring only to mutual dealings and accounts prior to the act of bankruptcy, because if it had been intended that the account was to stop at the act of bankruptcy the proviso would be meaningless and an unnecessary addition to the section. By fair implication, therefore, it may be taken that the Legislature did not so intend. The existence of mutual dealings and accounts protects the credits and debts on each side from the operation of the act of bankruptcy, until notice of it. It is unnecessary for their Lordships to decide what is the precise period at which an account of this kind, viz., an account of mutual dealings and transactions, is to stop. That must depend on the circumstances of each case and the nature of the credits, but their Lordships think that at least up to the time when the party who claims the benefit of the 39th clause has notice of an act of bankruptcy, the mutual account may and ought to be taken.

It is unnecessary, in the view their Lordships take of this case, to decide whether the authority to receive the purchase-money of the Savoy estate was a giving of credit by the bankrupts to the defendant within the meaning of the 39th clause. If the deed of conveyance had been entrusted to him for this purpose the case would be very like some of the instances referred to in *Rose* v. *Hart* (1). Their Lordships, however, do not find sufficient evidence of the deed having been handed over to him for that purpose. But authority was undoubtedly given to the defendant in the course of mutual dealings to receive the purchase-money and to place it to account; in fact, he had received the first £1000, and given credit for it in an account sent to the bankrupts and acknowledged by them before the bankruptcy. When under the same authority he afterwards received the £560 in question, it was no longer a credit, but a debt due from him to the bankrupts, and, as a debt, it would properly form an item in the mutual account.

The judges of the High Court, as already intimated, based their judgment mainly on the ground that the authority to receive the

(1) 2 Sm. L. C. 296.

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money was revoked by the act of bankruptcy. That point has been most elaborately argued at their Lordships' bar by the learned counsel for the respondent, but their Lordships are unable to assent to the view taken by the Court. Authorities which appertain to protected transactions are not in all cases revoked by an act of bankruptcy. If it were so, the protection given by the Act would in many cases be of no avail. Authorities given in the course of mutual dealings, and necessary to the continuance of those dealings, are, by implication, excepted from the rule that authorities are revoked by an act of bankruptcy. They continue and remain unrevoked by virtue of the provision which protects such dealings, in the same way as powers necessary to give effect to protected sales continue and remain unrevoked by an act of bankruptcy. If this were not so, in some cases of mutual credits the protection professed to be given would be illusory. In the case in the Common Pleas referred to in the argument, *Naoroji* v. *The Chartered Bank of India* (1), which was argued and treated as if the estate was administered in bankruptcy, though the action was brought in the name of the trader himself, under a deed of inspectorship, the bills had been delivered by the trader, before the execution of that deed, to the Chartered Bank of India to collect. The amount of the bills was received by the bank after the deed. It was held that this delivery and the authority to collect constituted a credit within the rule in *Rose* v. *Hart* (2), and it was supported as a credit within the mutual credit clause of the then Bankruptcy Act. It was assumed in that case that the authority was a revocable one. If the view taken by the Court below is right, this authority would have been revoked before the bank received the amount of the bills, and the judgment which held the transaction to be within the mutual credit clause would be incorrect. Their Lordships, however, see no reason to doubt the soundness of that decision.

The subject of the revocation of general powers by an act of bankruptcy with reference to protected sales came before the Lords Justices in the case of *Ex parte Snowball* (3). Lord Justice Mellish, in giving the judgment of the Court in that case, said:

(1) Law Rep. 3 C. P. 444. (2) 2 Sm. L. C. 296.
(3) Law Rep. 7 Ch. Ap. 534.

"We are of opinion that though, no doubt, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy, still if after the act of bankruptcy, but before the adjudication, property is conveyed under the power to a bonâ fide purchaser who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee. It is obvious that a power of attorney is not revoked for all purposes by an act of bankruptcy committed by the giver of the power, because, if no adjudication follows, a sale under the power is binding on the giver himself; and whenever a sale would be binding on a bankrupt if no adjudication follows, it is binding on the trustee under a subsequent adjudication if the purchaser had no notice of an act of bankruptcy having been committed by the seller at the time of the sale." Their Lordships think that this principle applies to the authority in this case, a payment having been made in pursuance of it, which became a debt in a mutual account within the scope of the 39th section; the reasons which induced the Court to hold that the power was not revoked in the case referred to apply with equal force to the case of such a debt.

Their Lordships do not decide this case upon the ground that there was a credit before the act of bankruptcy which matured into a debt after it, but upon the grounds that the authority given by the bankrupts to the defendant to receive the money was unrevoked at the time he received it; that it was therefore a rightful payment to him; that being so received, it became a debt and an item in the account between him and the bankrupts before notice of any act of bankruptcy; and that he is entitled to set off against it, in the action brought by the assignees, the debt due from the bankrupts to him.

Their Lordships think it unnecessary to give any opinion upon the point whether the transaction is a disposition of property protected by the 95th section of the Act, sub-sect. 1. If the transaction had been an isolated one, they might have had to consider that point; but the sum in dispute being an item in a mutual account between the parties, they think the case falls within the 39th section.

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Leave having been given by the learned judge to the defendant to move to enter the verdict, their Lordships are of opinion that the verdict and judgment should be entered for the defendant. They could not advise this order, in the face of the verdict of the jury upon the third question, if it had really been a finding of fact; but it being a mere conclusion of law, which they were directed to find by the judge, their Lordships do not think that it stands in the way of their advising the verdict to be entered according to what they consider to be the right conclusion of law from undisputed facts.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the High Court discharging the rule, and in lieu thereof to order that the rule be made absolute to enter the verdict and judgment for the defendant, with costs. The respondent must pay the costs of this appeal.

Solicitors for appellant: *Freshfields & Williams.*
Solicitors for respondent: *Druces, Jackson, & Attlee.*

[PRIVY COUNCIL.]

J. C.*
1881
Nov. 15.

In the Matter of the Scheme of the CHARITY COMMISSIONERS for the Administration of the SUTTON COLDFIELD GRAMMAR SCHOOL

AND

In the Matter of the Scheme for apportioning and applying for Educational Purposes Part of the Endowment of the WARDEN AND SOCIETY OF SUTTON COLDFIELD

AND

In the Matter of the ENDOWED SCHOOLS ACT, 1869, 1873, and 1874.

Endowed Schools Act, 1869, *s.* 39—*Petition by Inhabitants of Locality—Vested Interests, s.* 11.

In an appeal under sect. 39 of the Endowed Schools Act, 1869, by the corporation of Sutton Coldfield against two schemes of the Charity Commissioners, by which it was proposed to withdraw from that part of the funds of the corporation which were applicable for educational purposes a sum equal to £15,000, to be applied as part of the foundation of Sutton Coldfield Grammar School:—

Held, that the scheme could not be regarded as wanting in the finality required by the Act, because it was expressed to be without prejudice to a future scheme to be framed in accordance with the Acts of Parliament, words to that effect being surplusage.

Held further, that sect. 11 of the Act of 1869 protects vested interests only, that is the privileges or educational advantages to which the class of persons thereby or by later Acts designated have a legal title, and cannot be invoked to protect benefits which have been enjoyed by the permission or bounty of another.

In a similar appeal by the inhabitants of the locality, *held*, that such inhabitants had no locus standi to present it.

In re Shaftoe's Charity (1) approved.

THIS was an appeal against two schemes framed by the respondents, the Charity Comissioners for England and Wales, and submitted by them to the Committee of Council on Education, and approved by the said Committee.

* *Present:*—Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, The Master of the Rolls, Sir Richard Couch, and Sir Arthur Hobhouse.

(1) 3 App. Cas. 872.

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The nature of the schemes so far as is material, and the grounds upon which the appeal was made, appear in the judgment of their Lordships.

Miller, Q.C., and *W. Barber*, for the appellants, admitted that as regards the inhabitants of Sutton Coldfield they had no locus standi after the ruling of their Lordships in *In re Shaftoe's Charity* (1). As regards the warden and society of the town, it was contended that by the second scheme the endowments of the corporation would be without just cause in great part diverted from their proper objects, and applied to unnecessary purposes. Due regard had not been had to the educational interests of that class of the inhabitants which now has elementary education and other advantages supplied to them by the corporation; nor of that class of the inhabitants which now has the higher education supplied to them at the grammar school. Reference was made to sects. 11 and 24 of the Act of 1869; particularly to sub-sects. 2 and 4 of sect. 24, and to the Act of 1873, sect. 6; also to sect. 39 sub-sect. 4 of the Act of 1869. See also the Act of 1875, sect. 5. The scheme, moreover, was wanting in finality: see the 4th section thereof.

Horace Davey, Q.C., and *Romer*, Q.C., for the Charity Commissioners, were not called upon.

The judgment of their Lordships was delivered by

The Master of the Rolls (Sir *G. Jessel*):—

This is an appeal of the warden and society of the royal town of Sutton Coldfield against two schemes of the Charity Commissioners, by which it is proposed to withdraw from that part of the funds of the corporation which were applicable to educational purposes a sum equal to £15,000, to be applied as part of the foundation of the Sutton Coldfield Grammar School. There was a second appeal by the inhabitants of the locality; but that appeal, in conformity with a previous decision of their Lordships, could not be entertained, and may therefore be left out of consideration on the ground of the petitioners having no locus standi to present such an appeal.

With regard to the corporation, it is entitled to appeal as being

(1) 3 App. Cas. 872.

the body whose corporate funds are to be withdrawn; and the appeal is presented, as their Lordships understand, in pursuance of the provisions of the 39th section of the Endowed Schools Act 1869. They appeal, indeed, from two schemes, one being for the administration of Sutton Coldfield Grammar School, and the other for apportioning and applying for educational purposes part of the endowment of which the corporation are trustees. But they have no ground of appeal from the former of these schemes, and are only bringing it into this discussion by way of shewing the impropriety of the application made by the latter scheme.

The grounds of appeal which have been argued here are two. The first ground was that the scheme in question was not a final scheme as required by the Act, and therefore was not within the scope or terms of the Act.

Now that depends on the wording of the scheme. The objection cannot be quite understood without looking at what the scheme is. The scheme says:—"This part of this endowment applicable for educational purposes under this scheme shall, without prejudice to the application of any further part of this endowment for educational purposes under any future scheme, be such an amount," and so on; and the fourth section of the scheme is this:—"The Charity Commissioners may from time to time, in the exercise of their ordinary jurisdiction, frame schemes for the alteration of any portions of this scheme; provided that such schemes be not inconsistent with anything contained in the Endowed Schools Acts, 1869, 1873, and 1874." The result of these declarations is this, that the scheme is without prejudice to a future scheme to be framed in accordance with the Acts of Parliament. Speaking not otherwise than respectfully of the Charity Commissioners, it appears to their Lordships that those words are surplusage. The Acts of Parliament enable the commissioners to make schemes from time to time. Nothing that could be done by the scheme could affect the statutory right to make future schemes. The words complained of cannot give the commissioners any power which the statute does not confer upon them, nor can the omission of those words take away any power. The present scheme cannot either now or hereafter prejudice any future scheme. That being so, of course the whole of the argument that it is not final as regards this scheme falls to the ground.

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There is nothing said in the scheme as to the application of any future sum, but merely that a future scheme may be made. In other words, it appears to their Lordships that it merely expresses that which the Act of Parliament has already enacted: that a future scheme may be made.

It appears to their Lordships, therefore, that there is no want of finality in the scheme, and no valid objection to be raised to it on this ground.

The other objection was this:—It was said, that having regard to the provisions of the 11th section of the Act of 1869, as amended by the 6th section of the Act of 1873, the scheme was open to objection for not preserving, or rather for abolishing or modifying, the privileges or educational advantages to which persons of a particular class of life were entitled. Now the way the argument was put was this:—It was said, There are twelve elementary schools, as they may be called for the sake of distinction from the grammar school, and that if this scheme is carried out, and so large a sum as £15,000 is taken away from the funds of the Corporation, there will not be sufficient income left to maintain these twelve schools in their present state of efficiency, and also to provide for the other charities which the Corporation is liable to provide for, and for the other expenditure which it is under an obligation to make. The result, therefore, would be, that it would be necessary to make a school rate and to establish a school board while you are applying the funds to the support of a grammar school intended for the children of persons in a higher class of life than the poor persons whose children attend these elementary schools. Well, if that were so, and if it turned out that these persons were entitled to claim the benefit of the 11th section of the Act of 1869, modified in the way which has been mentioned, and that their existing educational advantages were wholly taken away or neglected in the new arrangements, of course the objection would prevail. But the first point to be considered is, what interests are protected by the Act. When you come to look at the 11th section it is plain that only what may be shortly termed vested interests are protected. It is: "Any privileges or educational advantages to which a particular class of persons"—or (as extended by the later Act) persons in a particular class of life—"are entitled," that is, have a legal title. A person is not

entitled simply because he has enjoyed, by the permission or the bounty of another, some benefit either for a longer or shorter period; and therefore the question is, whether the persons in this particular class of life are entitled to these educational advantages. Now, when we investigate the title, we shall find that the original charter gave no title at all to these particular persons, or persons in this particular class of life. The title really depends on a scheme which was sanctioned by the Court of Chancery in the year 1825; and that title is limited to three schools, two elementary schools strictly so called, for children of poor people, who are to be educated and clothed, and a preparatory school for the like instruction. It is quite plain that the persons of the particular class of life there mentioned are poor people entitled to the benefit of these elementary schools; but the next thing to be considered is the extent of the title. When we look at the amount which was to be applied under that scheme, we shall find that it was the then surplus of the income of the corporation, over and above certain sums which they were then liable to expend, which was distributed; and the amount allotted for the elementary schools was £215 to be spent in education proper, and £429 in clothing, making a total annual income of £644. It appears by the accounts which were furnished, that the average expenditure on these elementary schools has been £2365; that is, on an average of three years. Therefore they had expended £1721 more than the £644 to which a title is shewn. It was conceded in argument that you could not take the annual income of £15,000 as being more than £500 a year. The result therefore is, that not only has there been left by the Commissioners all that these people are entitled to, but more than double what they are entitled to; and consequently the scheme is not obnoxious, in the opinion of their Lordships, to any objection on the ground that the provisions of the 11th section have not been carried out.

For these reasons it appears to their Lordships that the objections fail; and that the appeal ought to be dismissed without costs, the Commissioners not asking for costs.

Solicitors for petitioners: *Iliffe, Russell, Iliffe, & Cardall.*
Solicitors for respondents: *Farrer, Ouvry, & Co.*

J. C.*
1881
July 7, 8, 9;
Nov. 26.

THE CITIZENS INSURANCE COMPANY OF CANADA . . . . . } DEFENDANT;

AND

WILLIAM PARSONS . . . . . PLAINTIFF.

AND

THE QUEEN INSURANCE COMPANY . . DEFENDANT;

AND

WILLIAM PARSONS . . . . . PLAINTIFF.

[ON APPEAL FROM THE SUPREME COURT OF CANADA.]

British North America Act, 1867, *ss.* 91, 92—*Distribution of Legislative Power*—"*Property and civil rights*"—"*Regulation of trade and commerce*"—*Validity of* (*Ontario*) *Act* 39 *Vict. c.* 24—*Construction*—*Statutory Conditions of Policies of Insurance*—*Interim Notes.*

Sects. 91 and 92 of the British North America Act, 1867, must, in regard to the classes of subjects generally described in sect. 91, be read together, and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can, without entering more largely than is necessary upon an interpretation of the statute.

Held, that;—

In No. 13 of sect. 92, the words "property and civil rights in the province" include rights arising from contract (which are not in express terms included under sect. 91) and are not limited to such rights only as flow from the law, e.g., the status of persons.

In No. 2. of sect. 91, the words "regulation of trade and commerce" include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and, it may be, general regulation of trade affecting the whole dominion; but do not include the regulation of the contracts of a particular business or trade such as the business of fire insurance in a single province, and therefore do not conflict with the power of property and civil rights conferred by sect. 92, No. 13.

Consequently;—

(Ontario) Act 39 Vict. c. 24, which deals with policies of insurance entered into or in force in the Province of Ontario for insuring property situate

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* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

therein against fire, and prescribes certain conditions which are to form part of such contracts, is a valid Act; applicable to the contracts of all such insurers in Ontario, including corporations and companies, whatever may be their origin, whether incorporated by British authority or by foreign or colonial authority.

Held, further, that the said Ontario Act is not inconsistent with Dominion Act 38 Vict. c. 20, which requires all insurance companies whether incorporated by foreign dominion or provincial authority to obtain a license, to be granted only upon compliance with the conditions prescribed by the Act.

Held, further, that according to the true construction of the Ontario Act, whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act. The penalty for not observing that manner is that the policy becomes subject to the statutory conditions, whether printed or not. Where a company has printed its own conditions and failed to print the statutory ones it is not the case that the policy must be deemed to be without any conditions at all.

An interim note being merely an agreement for interim insurance preliminary to the grant of a policy is not a policy within the meaning of that term in the Ontario Act. "Subject to all the usual terms and conditions of this company" in such note means that such conditions ought to be read into the interim contract to the extent to which they may lawfully be made a part of the policy when issued by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the Court or judge.

APPEALS from two judgments of the Supreme Court (June 21, 1880).

In the first case the action was brought on the 18th of March, 1878, for the sum secured by a certain policy of insurance.

The defence was non-disclosure by the respondent of a previous insurance which was alleged to be (a) a breach of the conditions indorsed on the policy; (b), in the alternative, a breach of the statutory conditions prescribed by Ontario Act 39 Vict. c. 24.

The respondent replied that the policy was not subject to the conditions indorsed upon it because they were not printed as variations from the statutory conditions in the manner prescribed by the statute; nor to the statutory conditions, because they did not appear on the policy.

The judge ruled in favour of the respondent's contention, and a verdict was entered for him for $2575, but the judge reserved all questions of law for the Court.

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On the 23rd of May, 1878, the company obtained a rule nisi in the Court of Queen's Bench for the province of Ontario to enter a nonsuit pursuant to leave reserved, or for a new trial, on the ground that the verdict was contrary to law and evidence.

On the 29th of June, 1878, the rule nisi was discharged, the Court holding that insurance companies incorporated by the dominion parliament are, as regards insurances effected by them in the province of Ontario, bound by the provincial statute 39 Vict. c. 24, and subject to all the consequences of non-compliance with its provisions; and, further, that a policy of insurance issued after the passing of the Act, but not in compliance with its provisions, was to be deemed as against the assured as a policy without any conditions.

On appeal by the company, the Court of Appeal for the province, on the 10th of March, 1879, affirmed the judgment of the Court of Queen's Bench. A further appeal was dismissed by a majority of the judges of the Supreme Court of Canada, on the 28th of June, 1880.

In the second case, the action was brought on the same date (18th of March, 1878), on an interim receipt to recover the amount of the insurance thereby effected.

The defence was, non-disclosure by the respondent of previous insurances; that more than 10lbs. of gunpowder had been deposited in the insured premises after the issuing of the receipt and contrary to the terms thereof; that no notice of loss in writing had been given; that more than 25lbs. of gunpowder were on the premises at the time of the fire.

The respondent joined issue on the pleas of the appellant. It was not denied that the usual terms and conditions indorsed on the appellant's policies had not been complied with, but it was contended by the respondent that the Ontario statute rendered void those terms and conditions as not having been indorsed in the form required by the statute as variations in the statutory conditions; and it was further contended by the respondent that the statutory conditions did not apply in that they were not indorsed on the interim note, as required by the said statute, and the judge was prepared so to rule upon the authority of two cases previously decided by the Courts of Ontario, but he said

that as the only one of the statutory conditions upon which reliance could be placed by the appellant was the condition that the sum insured should not be recovered if more than 25 lbs. of gunpowder were on the premises at the time of the fire, he should leave the question to the jury whether there were 25 lbs. of gunpowder on the premises at the time of the fire or not.

The jury found that there were not 25 lbs. of gunpowder on the premises at the time of the fire, and a verdict was therefore entered for the respondent for the sum of $2070, but the judge reserved leave for the appellant to enter a nonsuit if the said usual terms and conditions were binding on the respondent.

On the 23rd of May, 1878, the appellant obtained a rule nisi in the Court of Queen's Bench of the province of Ontario to enter a nonsuit pursuant to the leave reserved at the trial, and to set aside the verdict at the trial for misdirection of the Judge, (1) there being further insurances on the property insured; (2) a greater quantity of gunpowder contained in the premises containing the insured goods than permitted by and contrary to the terms of the Appellant's contract with the Respondent; and (3) the proofs of loss required by the contract not having been furnished in due time; which misdirection consisted in telling the jury there was no question for them except the quantity of gunpowder on the premises.

The Court of Queen's Bench discharged the rule and held—

(1.) That the Act imposing the statutory conditions applied to the case of an interim receipt, as well as to actual policies, and that the requirements of the statute not having been complied with, the contract contained in the interim receipt was subject (*a*) either to the statutory conditions, (*b*) or to no conditions except such as might be implied by law.

(2.) That there was no evidence of prior insurances not properly disclosed.

(3.) That the respondent was entitled to retain the verdict.

The Court of Appeal of Ontario, on the 22nd of March, 1879, dismissed an appeal from the said judgment, and a majority of the Judges of the Supreme Court of Canada dismissed a further appeal which was instituted against the judgment of the 22nd of March.

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The Solicitor-General (*Sir F. Herschell*, Q.C.), and *Benjamin*, Q.C. (*Jeune* with them), for the appellant in the first case, contended that according to the conditions appearing on the policy, and assented to by the respondent, he was not entitled to be paid the compensation which he claimed thereunder. As regards Ontario Statute, 39 Vict. c. 24, it was contended, first, that it was void as being ultrà vires the provincial legislature; second, that if valid and applicable so as to disentitle the company to rely on the conditions which appeared on the policy, still the omissions complained of with regard to previous insurance were not merely a breach of the said conditions, but also of the conditions imposed by the statute and imported thereby into the policy, whether printed thereon or not.

As regards the validity of the Act, it was contended that according to the true construction of the British North America Act, 1867, such an enactment was within the exclusive competence of the dominion parliament, and beyond that of the Ontario Legislature. Reference was made especially to sect. 91, No. 2, and sect. 92, No. 13. In the former "regulation of trade and commerce" means within the whole dominion. They are the most general words which can be used, and include every kind of business which can possibly be carried on. Reference was made to the Civil Code of Lower Canada, art. 2470. [SIR A. HOBHOUSE referred to sect. 92, No. 10, as shewing that at all events some subjects of trade and commerce can be regulated by the provincial parliament.] But in this case the Ontario statute purports to regulate the whole conduct of insurance business within the province, notwithstanding that in the one case the company was incorporated by the dominion, and in the other by the imperial parliament, in the one case the proposal to insure was made in Ontario, and accepted in Montreal, in the other, the contract on the interim note was complete in Ontario. Further the Dominion Act, 38 Vict. c. 20, has imposed certain conditions upon companies of this kind upon the performance of which the right to carry on business results, which cannot afterwards be hampered or restricted, however locally, by a provincial legislature. The scheme of the British North America Act is that the dominion parliament has all legislative power except that which is exclusively given to

the provincial legislatures. The true mode of construction is to see if the subject is exclusively given to the provincial parliament, if not it belongs to the dominion parliament. The true meaning of sect. 92, No. 13, is that the provincial parliament has the exclusive right to create within the province rights of property and such civil rights as flow from the operation of law; which it can exercise without infringing the dominion control over contracts and the rights resulting therefrom. The circumstances under which the Imperial Act was passed and its object should be taken into consideration in construing it. Sects. 3, 4, 5, and 6 are important. Two provinces of Ontario and Quebec were created, because the latter is a French colony governed by French civil law. Rights of property and civil rights are there governed differently from the other provinces. Sect. 94 omits Quebec from the uniformity of legislative concurrent power; compare sects 93 and 95. That throws light on the meaning of the expression in sect. 92, No. 13; which is to be construed in its narrower sense, and not so as to affect or cut down the exclusive control over trade, commerce, and contracts given to the dominion parliament. Contract, moreover, is not included in that chapter of the Civil Code which deals with civil rights. Though a single contract of indemnity may not be trade and commerce, yet if an insurance company is formed whose business it is to make such contracts, its transactions fall within the description of trade and commerce, that is of carrying on business for a profit, which is all that is meant by trade. One of the companies in these cases is sued as a company under the Dominion Act, see 39 Vict. c. 55, and 27 & 28 Vict. c. 98. The dominion power, therefore, to incorporate a company is admitted, but it is contended upon the other side that the power to prescribe its mode of carrying on business must be split between the two legislatures in a way which is irreconcilable with the word "exclusive," as used in the Imperial Act.

With regard to the second case the terms of the special contract under the interim receipt must be attended to, into which conditions similar to those appearing on the policy were imported by reference and assented to by the respondent, and were therefore binding for similar reasons.

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Sir John Holker, Q.C., and *A. L. Smith*, for the respondent, contended that the provincial legislature had power to enact the statute 39 Vict. c. 24, and that its requirements had not been complied with. With regard to the validity of the Act, the real question is whether insurance is trade and commerce within the meaning of sect. 91, No. 2 of the Act of 1867. If the other side can establish their definition of trade as that of carrying on business for a profit there is nothing more to be said. But they gave no authority for that definition, which rests only upon imagination. Agriculture, schoolmastering, the business of a solicitor, are all businesses carried on for profit, yet these are not trades. The insurer contracts for a consideration, but he neither buys nor sells. He is not connected with trade or commerce in any way. He does not sell indemnities. To buy and sell merchandise is the notion of a trader which pervades the Bankruptcy Acts. Reference was made to *In re Griffith, Carr* v. *Griffith* (1); *Lawless* v. *Sullivan* (2). Insurance is not a trade. The regulation of trade and commerce has been well defined by Mr. Justice Henry in this case as including the operations of manufacturers, the hiring of their operatives, the providing and erection of machinery, procuring the raw materials used by them, with the necessary contracts and agreements and expenditure of labour employed, and the interests of all parties engaged, from the owner of the soil through all the train of persons engaged, in producing and supplying timber, iron, or other materials, for manufacturing purposes. A fire insurance company may operate in respect of agricultural buildings, but that affects in a very remote way the trade and commerce of the country. Sect. 91, No. 2, should be construed as applying to all regulations of trade and commerce which do not affect civil rights. But the local legislatures are empowered to deal with all questions of a local character, and the mode in which persons carry on their business within the limits of the province is a question of a local character. If a railway began and ended within a particular province, there is no reason why provincial legislation should not regulate it. The provinces are virtually separate countries federated into one, as in the case of the United States Each member of the confederation is a separate state, and has

(1) Law Rep. 12 Ch. D. 655. (2) 6 App. Cas. 382.

the right to make its own laws, subject to those which apply to the whole confederation. If the provincial legislature can incorporate companies for provincial objects, regulate provincial agriculture, deal with public-houses in the province, there would seem to be no reason why it should not prescribe the mode of carrying on the business of fire insurance within the province. The expression "civil rights" in sect. 92, No. 13, cannot be restricted as contended for on the other side. It is not so restricted in the Civil Code of Lower Canada, in which under that head a number of provisions relating to contract are to be found. See also the expression as used in 14 Geo. 3, c. 83. As to the power of the dominion parliament indirectly by its regulations of trade to affect such rights as it is contended are assigned to provincial legislative competence, see *Cushing* v. *Dupuy* (1); *L'Union St. Jacques de Montréal* v. *Belisle* (2).

The Ontario Act being valid and operative it follows that both the policy and the interim note could be treated by the respondent as free from conditions, and that the respondent having in each case proved the contract and loss, is entitled to recover. The interim receipt was a policy within the meaning of the local Act. In neither case had the requirements of that Act been complied with. The statutory conditions were not printed, nor were the variations therein made as required. If the policy was not freed from conditions altogether, the respondent was only bound by the conditions thereon, which related to the case of a subsequent insurance, and not to an insurance existing at the time of making the policy. As to the interim note, that must be treated as subject only to the statutory conditions, none of which had been infringed; otherwise it was not proved that any of the usual terms or conditions of the company, even if imported by reference into the contract, had been infringed by the respondent.

The Solicitor-General replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE SMITH:—

The questions in these appeals arise in two actions brought by

(1) 5 App. Cas. 409, 410–415. (2) Law Rep. 6 P. C. 31.

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the same plaintiff (the respondent) upon contracts of insurance against fire of buildings situate in the province of Ontario, in the dominion of Canada.

The most important question in both appeals is one of those, already numerous, which have arisen upon the provisions of the British North America Act, 1867, relating to the distribution of legislative powers between the parliament of Canada and the legislatures of the provinces, and, owing to the very general language in which some of these powers are described, the question is one of considerable difficulty. Their Lordships propose to deal with it before approaching the facts on which the particular questions in the actions depend. It will only be necessary to premise that "The Citizens Insurance Company of Canada," the defendant in the first action, was originally incorporated by an Act of the late province of Canada, 19 & 20 Vict. c. 124, by the name of "The Canada Marine Insurance Company." By another Act of the late province, 27 & 28 Vict. c. 98, further powers, including the power of effecting contracts of insurance against fire, were conferred on the company, and its name changed to "The Citizens Insurance and Investment Company;" and, finally, by an Act of the dominion parliament, its name was again changed to the present title, and it was enacted that, by its new name, it should enjoy all the franchises, privileges, and rights, and be subject to all the liabilities of the company under its former name.

The Queen Insurance Company is an English fire and life insurance company incorporated under the provisions of the Joint Stock Companies Act of the imperial parliament, 7 & 8 Vict. c. 110. It has its principal office in England, and carries on business in Canada.

The defendant company in each of the actions is the Appellant.

The statute impeached by the appellants, as being an excess of legislative power, is an Act of the legislature of the province of Ontario (39 Vict. c. 24), intituled "An Act to secure uniform Conditions in Policies of Fire Insurance."

The preamble of the Act is as follows:—

"Whereas under the provisions of an Act passed in the 38th year of the reign of Her Majesty, intituled 'An Act to

amend the Laws relating to Fire Insurances,' the Lieutenant-Governor issued a commission to certain commissioners therein named, requiring them to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies on real or personal property in this province: And whereas a majority of the said commissioners have, in pursuance of the requirements of the said Act, settled and approved of the conditions set forth in the schedule to this Act; and it is advisable that the same should be expressly adopted by the legislature as the statutory conditions to be contained in policies of fire insurance entered into or in force in this province:

It enacts as follows:—

1. "The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereafter entered into, or renewed, or otherwise in force in Ontario, with respect to any property therein, and shall be printed on every such policy with the heading 'Statutory Conditions,' and if a company (or other insurer) desire to vary the said conditions, or to omit any of them or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect:—

Variations in Conditions.

"'This policy is issued on the above statutory conditions, with the following variations and additions:—

"'These variations (*or as the case may be*) are, by virtue of the Ontario statute in that behalf, in force so far as, by the Court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company.'

"2. Unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, no such variation, addition, or omission shall be legal and binding on the insured; and no question shall be considered as to whether any such variation, addition, or omission is, under the circumstances, just and reasonable, and on the contrary the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions,

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or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid.

"3. A decision of a Court or judge under this Act shall be subject to review or appeal to the same extent as a decision by such Court or judge in other cases."

The schedule contains twenty-one conditions under the head "Statutory Conditions." The following of them are material to the particular questions to be decided in the appeals:—

"After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company shall, in writing, point out the particulars wherein the policy differs from the application."

"8. The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears therein, or is indorsed thereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent."

"In the event of any other insurance on the property therein described having been assented to as aforesaid, then this company shall, if such other insurance remain in force, on the happening of any loss or damage, only be liable for the payment of a rateable proportion of such loss or damage without reference to the dates of the different policies."

"10. The company is not liable for the losses following, that is to say, among others:—

"(*g*) The company is not liable for loss or damage occurring while petroleum," and various other enumerated substances, "or more than twenty-five pounds' weight of gunpowder, are stored or kept in the building insured, or containing the property insured, unless permission is given in writing by the company."

The distribution of legislative powers is provided for by sects. 91 to 95 of "the British North America Act, 1867;" the most important of these being sect. 91, headed "Powers of the Parliament," and sect. 92, headed "Exclusive Powers of Provincial Legislatures."

Sect. 91 is as follows:—

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say,—"

Then follows an enumeration of twenty-nine classes of subjects.

The section concludes as follows:—

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Sect. 92 is as follows:—

"In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—"

Then follows an enumeration of sixteen classes of subjects.

The scheme of this legislation, as expressed in the first branch of sect. 91, is to give to the dominion parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If the 91st section had stopped here, and if the classes of subjects enumerated in sect. 92 had been altogether distinct and different from those in sect. 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the dominion parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be

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attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" that (notwithstanding anything in the Act) the exclusive legislative authority of the parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of sect. 91 was introduced, though it may be observed that this paragragh applies in its grammatical construction only to No. 16 of sect. 92.

Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in sect. 91; it is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in sect. 92, and no one can doubt, notwithstanding the general language of sect. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of

the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature primâ facie falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne.

The main contention on the part of the respondent was that the Ontario Act in question had relation to matters coming within the class of subjects described in No. 13 of sect. 92, viz., "Property and civil rights in the province." The Act deals with policies of insurance entered into or in force in the province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, "Property and civil rights." The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as

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an instance the status of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in sect. 91.

It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sects. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at sect. 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., "18, bills of exchange and promissory notes," which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the dominion parliament.

The provision found in sect. 94 of the British North America Act, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides as throwing light upon the sense in which the words "property and civil rights" are used. By that section the parliament of Canada is empowered to make provision for the uniformity of any laws relative to "property and civil rights" in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in these three provinces, if the provincial legislatures choose to adopt the provision so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words "property and civil rights" are, obviously, used in the same sense in this section as in No. 13 of sect. 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for

uniformity. If, however, the narrow construction of the words "civil rights," contended for by the appellants were to prevail, the dominion parliament could, under its general power, legislate in regard to contracts in all and each of the provinces and as a consequence of this the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act.

It is to be observed that the same words, "civil rights," are employed in the Act of 14 Geo. 3, c. 83, which made provision for the Government of the province of Quebec. Sect. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

The next question for consideration is whether, assuming the Ontario Act to relate to the subject of property and civil rights, its enactments and provisions come within any of the classes of subjects enumerated in sect. 91. The only one which the Appellants suggested as expressly including the subject of the Ontario Act is No. 2, "the regulation of trade and commerce."

A question was raised which led to much discussion in the Courts below and this bar, viz., whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be "traders" under the English bankruptcy laws; they have been made subject to those laws by

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special description. Whether the business of fire insurance properly falls within the description of a "trade" must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade.

The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in Acts of State relating to trade and commerce. Article V. of the Act of Union enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation" to and from all places in the United Kingdom and the Colonies; and Article VI. enacted that all parts of the United Kingdom from and after the Union should be under the *same* "prohibitions, restrictions, and *regulations of trade*." Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby

infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this Board in the cases of *L'Union St. Jacques de Montréal* v. *Belisle* (1); *Cushing* v. *Dupuy* (2).

It was contended, in the case of the Citizens Insurance Company of Canada, that the company having been originally incorporated by the parliament of the late province of Canada, and having had its incorporation and corporate rights confirmed by the dominion parliament, could not be affected by an Act of the Ontario legislature. But the latter Act does not assume to interfere with the constitution or status of corporations. It deals with all insurers

(1) Law Rep. 6 P. C. 31. (2) 5 App. Cas. 409.

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alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority, as in the case of the Queen Insurance Company, or by foreign or colonial authority, and without touching their status, requires that if they choose to make contracts of insurance in Ontario, relating to property in that province, such contracts shall be subject to certain conditions.

It was further urged that the Ontario Act was repugnant to the Act of the late province of Canada, which empowered the company to make contracts for assurance against fire "upon such conditions as might be bargained for and agreed upon between the company and the assured." But this is, in substance, no more than an expanded description of the business the company was empowered to transact, viz., to make contracts of assurance against fire, and can scarcely be regarded as inconsistent with the specific legislation regarding such contracts contained in the Act in question.

It was further argued on the part of the appellants that the Ontario Act was inconsistent with the Act of the dominion parliament, 38 Vict. c. 20, which requires fire insurance companies to obtain licences from the minister of finance as a condition to their carrying on the business of insurance in the dominion, and that it was beyond the competency of the provincial legislature to subject companies who had obtained such licences, as the appellant companies had done, to the conditions imposed by the Ontario Act. But the legislation does not really conflict or present any inconsistency. The statute of the dominion parliament enacts a general law applicable to the whole dominion, requiring all insurance companies, whether incorporated by foreign, dominion, or provincial authority to obtain a licence from the minister of finance, to be granted only upon compliance with the conditions prescribed by the Act. Assuming this Act to be within the competency of the dominion parliament as a general law applicable to foreign and domestic corporations, it in no way interferes with the authority of the legislature of the province of Ontario to legislate in relation to the contracts which corporations may enter into in that province. The Dominion Act contains the following provision, which clearly recognises the right of the provincial

legislature to incorporate insurance companies for carrying on business within the province itself:—

"But nothing herein contained shall prevent any insurance company incorporated by or under any Act of the legislature of the late province of Canada or of any province of the dominion of Canada from carrying on any business of insurance within the limits of the late province of Canada, or of such province only according to the powers granted to such insurance company within such limits as aforesaid, without such licence as hereinafter mentioned."

This recognition is directly opposed to the construction sought to be placed by the appellant's counsel on the words "provincial objects," in No. 11 of sect. 92,—"the incorporation of companies with provincial objects," by which he sought to limit these words to "public" provincial objects, so as to exclude insurance and commercial companies.

Ritchie, C.J., refers to an equally explicit recognition of the power of the provinces to incorporate insurance companies contained in an earlier Act of the dominion parliament (31 Vict. c. 48), which was passed shortly after the establishment of the dominion.

The learned Chief Justice also refers to a remarkable section contained in the Act of the dominion parliament consolidating certain Acts respecting insurance, 40 Vict. c. 42. Section 28 of that Act is as follows:—

"This Act shall not apply to any company within the exclusive legislative control of any one of the provinces of Canada, unless such company so desires; and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada."

This provision contains a distinct declaration by the dominion parliament that each of the provinces had exclusive legislative control over the insurance companies incorporated by it, and therefore is an acknowledgment that such control was not deemed to be an infringement of the power of the dominion parliament as to "the regulation of trade and commerce."

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The declarations of the dominion parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the dominion parliament in its actual legislation may properly be considered.

The opinions of the majority of the Judges in Canada, as summed up by Ritchie, C.J., are in favour of the validity of the Ontario Act. In the present actions, the Court of Queen's Bench and the Court of Appeal of Ontario unanimously supported its legality; and the Supreme Court of Canada, by a majority of three Judges to two, have affirmed the judgments of the provincial Courts. The opinions of the learned Judges of the Supreme Court are stated with great fullness and ability, and clearly indicate the opposite views which may be taken of the Act, and the difficulties which surround any construction that may be given to it.

Taschereau, J., in the course of his vigorous judgment, seeks to place the plaintiff in the action against the Citizens Company in a dilemma. He thinks that the assertion of the right of the province to legislate with regard to the contracts of insurance companies amounts to a denial of the right of the dominion parliament to do so, and that this is, in effect, to deny the right of that parliament to incorporate the Citizens Company, so that the plaintiff was suing a non-existent defendant. Their Lordships cannot think that this dilemma is established. The learned Judge assumes that the power of the dominion parliament to incorporate companies to carry on business in the dominion is derived from one of the enumerated classes of subjects, viz., "the regulation of trade and commerce," and then argues that if the authority to incorporate companies is given by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other. But, in the first place, it is not necessary to rest the authority of the dominion parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature

being "the incorporation of companies with provincial objects," it follows that the incorporation of companies for objects other than provincial falls within the general powers of the parliament of Canada. But it by no means follows (unless indeed the view of the learned judge is right as to the scope of the words "the regulation of trade and commerce") that because the dominion parliament has alone the right to create a corporation to carry on business throughout the dominion that it alone has the right to regulate its contracts in each of the provinces. Suppose the dominion parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over "property and civil rights in the province") that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body.

On the best consideration they have been able to give to the arguments addressed to them and to the judgments of the learned judges in Canada, their Lordships have come to the conclusion that the Act in question is valid.

Their Lordships have now to consider separately the two appeals.

The Citizens Insurance Company of Canada v. *Parsons.*

This company, whose incorporation has been already described, has its head office in Montreal, and carries on business in Ontario and the other provinces of Canada.

The respondent insured with the company, through its local agent in the town of Orangeville, Ontario, a building situate in that town, occupied as a hardware store, for one year in $2,500, and, on the 4th of May, 1877, a policy of the company containing this insurance was issued by the agent at Orangeville to him. This policy was made subject to the usual conditions of the

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company, which were indorsed on it. The following is alone material:—

"The assured must give notice to this company of any other insurance effected on the same property, and have the same indorsed on this policy, or otherwise acknowledged by the company in writing, and failure to give such notice shall void this policy. . . .

"And this policy is made and accepted under the conditions above mentioned, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for."

The conditions contained in the Ontario Act were not printed in the policy, nor was any reference made to them in it.

On the 3rd of August, 1877, the insured building was destroyed by fire. The respondent thereupon brought the present action.

At the time the insurance was made and the policy issued by the Citizens Company, another insurance had been effected on the same building with the Western Assurance Company, of which no notice was given by the respondent to the Citizens Company, nor was it indorsed on or indicated in the policy, nor did the acknowledgment or assent of the Citizens Company thereto in writing in any way appear. These omissions constituted a breach not only of the conditions indorsed on the policy, but also of the condition in relation to prior insurances contained in the Ontario Act already set out, and, consequently, if either of these conditions forms a part of the contract between the parties, the respondent's action against the company must fail. It is admitted that this is so, but it is contended, on the part of the respondent, that neither the agreed nor the statutory conditions are binding upon him, and that the contract of insurance is subject to no conditions whatever. The Courts of Canada have sustained this contention.

The question turns on the construction of the Ontario Act. It is not disputed by the company that the conditions indorsed on the policy, which form the actual contract between the parties, are, by force of the statute, displaced, inasmuch as they are not shewn to be variations from the statutory conditions in compliance with the provisions of the Act. The question to be decided is

whether the effect of this non-compliance is to make the contract subject to the statutory conditions, or to reduce it to a bare contract of insurance without any conditions.

Sect. 1 enacts that "the conditions set forth in the schedule to the Act shall, as against the insurers, be deemed to be part of every policy." Notwithstanding this express enactment, it is contended that they are not to be so deemed, unless they are printed on the policy. The section, no doubt, goes on to enact, but not in the form of a proviso or condition, that the conditions "shall be printed on every such policy with the heading 'Statutory Conditions'"; but it does not enact that, if there be an omission so to print them, they shall not be deemed to be a part of the contract. Printing the statutory conditions is made a necessary part of the mode prescribed by the Act of shewing variations from them, and is unquestionably essential to the validity of any such variations, for the section further enacts that if insurers desire to vary the statutory conditions, or to omit any of them, or to add new conditions, "there shall be added, in conspicuous type, and in ink of different colour, words to the following effect:—

"*Variations in Conditions.*

"This policy is issued on the above statutory conditions, with the following variations and additions."

Sect. 2 provides what may be called a penalty for the non-observance of these last-mentioned provisions. It enacts that, unless distinctly indicated in the manner prescribed, "no such variation, addition, or omission shall be legal and binding on the insured," and, "on the contrary,"—here follows the consequence and penalty,—"the policy shall, as against the insurers, be subject to the statutory conditions only." The effect of these enactments in the present case, is that the conditions written on the policy are not binding on the insurer, either by virtue of the actual contract, or as variations from the statutory conditions, because they are not indicated to be so in the manner prescribed by the statute. Printing the statutory conditions is a necessary part of the manner prescribed for indicating these variations, and the penalty provided by the Act for not observing that manner

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is that *the policy becomes subject to the statutory conditions.* No provision is made for the omission to print the statutory conditions as a separate default; and their Lordships think, looking at the object and scope of the two sections, that, in the absence of an express enactment to that effect, it cannot be implied that the intention of the legislature was that, in a case where the company has printed its own conditions, but has failed to print the statutory ones, the policy is to be deemed to be without any conditions. Indeed, such an implication would seem to be opposed to the principle of the Act, which is that, except in the case of variations properly indicated, the statutory conditions shall be deemed to be part of every policy.

It was further contended, and the contention seems to have been supported by some of the Judges, that if the statutory conditions, in cases like the present, are to be deemed to be a part of the policy, they form a part of the contract only as against the insurers, and are not binding on the assured. Their Lordships cannot agree with this construction of the Act. The 1st section of the Act, which declares that the statutory conditions shall be deemed to be part of every policy of fire insurance, also contains the words "as against the insurers," and it is evident that these words must have the same meaning in both sections. If the construction put on them by the respondent be correct, it would follow that in a case where an insurance company implicitly followed the direction of the statute, and printed the statutory conditions on its policies without more, the conditions would still be a part of the contract only as against the company, and the assured would not be bound by them. Such a construction leads to manifest absurdity, and to consequences which the legislature could not have intended. The preamble of the Act shews that the conditions were passed by the legislature as being "just and reasonable." On looking at the twenty-one conditions contained in the schedule, it will be found, as might naturally be expected, that they are all, with a trifling exception, protective of the insurers, though probably less stringent than those usually imposed by the companies themselves. They impose obligations, not on the insurers, but the assured. To construe the statute, therefore, as enacting that these conditions are binding only on the insurers

for whose protection they are introduced into the contract, and not on the assured by whom they are to be performed, would be to affirm that the legislature has used words signifying, in effect, that the conditions which it has declared shall be a part of the contract shall not be binding at all. But effect may be given to the words in question without resorting to such a construction of them.

Strong reasons would be required to shew that the words "as against the insurers" are used in the 2nd section in a different sense from that in which they are used in the 1st, but none can be suggested. The 2nd section provides as an alternative, that unless the variations are shewn in the prescribed manner, the policy shall, as against the insurers, be subject to the statutory conditions only, that is to say, the variations as against the company shall not, and the statutory conditions shall, avail. If the respondent's construction were to prevail, though the consequences under this section might not be so manifestly absurd as in the case already adverted to of a company having simply printed the statutory conditions without more, it would still lead to much injustice; for if a company in making variations, though in all other respects complying with the statute, should not use what might be thought conspicuous type or ink of the right colour, not only would the variations it had attempted to make be of no effect, but it could not invoke the statutory conditions, and the insured would be free from any conditions whatever.

It may possibly have been intended to give to the assured an option, if he thought the company's conditions more favourable to him than the statutory ones, to stand upon the actual conditions; but it could not have been intended, nor does the language of the Act need such a construction, that he should be set free from both sets of conditions. The meaning of the legislation, though no doubt unhappily expressed, appears to be, that whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and that the latter shall alone be deemed to be part of the policy, and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the prescribed manner.

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Their Lordships being of opinion that the policy in this case became subject to the statutory conditions, and there having been a breach of those conditions, the plaintiff's action against the Citizens Insurance Company fails. They will therefore humbly advise Her Majesty to order that the judgments appealed from be reversed, and that the rule obtained by the company to set aside the verdict and enter a nonsuit be made absolute.

The Queen Insurance Company v. *Parsons.*

This English corporation carries on business at Orangeville through an agent. On the 3rd of August, 1877, the respondent applied to this agent to effect with the company an insurance for $2000 on a general stock of hardware and other goods contained in the building in Orangeville, which was the subject of insurance in the other action, and a premium of $40 was agreed on.

An interim receipt was thereupon given to the respondent by the agent, which is in the following terms:—

"Interim Receipt.

"Fire Department. Interim Protection Note.

"Queen Fire and Life Insurance Company.

"Chief Office, Queen Insurance Buildings, Liverpool.

"Canada Head Office, 191, St. James Street, Montreal.

"No. 33. Orangeville Agency, 3rd August, 1877.

"Mr. William Parsons having this day proposed to effect an insurance against fire, subject to all the usual terms and conditions of this company, for $2000, on the following property in the town of Orangeville, for twelve months, namely, on general stock of hardware, paints, oils, varnishes, window glass, stoves, tinware, castings, hollow ware,' plated and fancy goods, lamps, lamp glasses, and general house furnishing goods.

"And having also paid the sum of $40 as the premium on the same, it is hereby held assured under these conditions until the policy is delivered or notice given that the proposal is declined by the company, when this interim note will be thereby cancelled and of no effect.

"(Signed) A. M. KIRKLAND,
"Agent to the company.

"N.B.—The deposit will be returned, less the proportion for the period, on application to the agent signing this note, in the event of the proposal being declined by the company. If accepted, a policy will be prepared and delivered within thirty days. If the holder does not receive a policy during the specified period, he should apply to the head office in Montreal."

A fire happened on the same day, before a policy had been delivered to the respondent.

The action was brought upon the interim receipt. The declaration which was framed upon it, as originally drawn, set out the conditions of the company as those to which the insurance was declared by the interim note to be subject. It is agreed that the declaration was afterwards amended by striking out these conditions, though the amendment does not appear on the record.

Having regard to the arguments addressed to their Lordships, it is only material to refer to one of the company's usual conditions, the 4th, which provides, among other things, that the company will not be liable for any loss or damage when more than 10 lbs. weight of gunpowder is deposited or kept on the premises, unless the same is especially allowed in the body of the policy, and suitable extra premium paid. This quantity of gunpowder is smaller than that mentioned in the statutory condition above set out, 10 (*g*), which provides that the company is not liable for loss or damage occurring while, among other things, more than 25 lbs. weight of gunpowder are stored or kept in the building containing the property insured.

It is admitted that at the time of the fire gunpowder exceeding 10 lbs. in weight was kept in the building destroyed by the fire, and the jury have found that the quantity so kept was less than 25 lbs.

It is contended on the part of the respondent that the contract must, by force of the Ontario Act in question, be treated as being without any conditions; or, if subject to any, to the statutory conditions only.

The judgment of their Lordships in the other action has disposed of the first of these contentions. The second raises the question, whether the company's own conditions or the statutory conditions

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are to be regarded as forming part of the contract, and its answer depends upon a consideration of the further question, whether the interim note is a policy of insurance within the meaning of that term in the Ontario Act.

This note is not a policy of insurance in the common understanding of that word, and was certainly not understood to be so by the parties to it. It is expressly a contract with a view to a policy, making interim provision until a policy is prepared and delivered. It contains a proposal for insurance, which, if accepted by the company, would result in a policy to be based on the terms of the proposal, and issued by the company to the respondent; the company having an option to decline the proposal, in which case no policy would be delivered. The proposal thus offered for acceptance is "to effect an insurance subject to all the usual terms and conditions of this company," and pending the acceptance or refusal of the company, and until the policy is delivered or notice given that the insurance is declined, the property is "held assured under these conditions." No doubt this last stipulation forms a contract of insurance during this interval; but the whole agreement is preliminary only, and, in substance, the note contains a proposal for a policy to be carried into effect, if accepted, by the delivery of a policy; as subsidiary thereto, and for the convenience of the person proposing to insure, immediate protection is granted to him. The practice of issuing interim notes must have been well known, and apt words might have been found by the legislature to describe them if they had been intended to be included in the Act. It may have been thought that it would be a clog upon the business of insurance, and would place difficulties in the way of obtaining these interim protection notes, if companies were obliged to prepare them with all the fulness and formalities which the Act requires in the case of policies.

Their Lordships, therefore, are disposed to come to the conclusion that the interim note in question is not a policy of insurance within the meaning of the Act. If in any case it should appear that an interim note or any like instrument was intended by the parties to be the complete and final contract of insurance, and that this shape was given to the instrument for the purpose of evading the Act, the present decision would not be opposed to the instru-

ment being treated as a policy of insurance; the ground of their present decision being that the interim note in this case is what it professes to be, preliminary only to the issuing of another instrument, viz., a policy, which the parties bonâ fide intended should be issued.

These interim protection notes, given by fire insurance companies, bear an analogy to the "slips," commonly used in cases of marine insurance, preliminary to the issuing of policies. The slip contains the heads of the contract, and is in itself a contract of insurance, though by the statute law of England, passed for revenue purposes, it could not, until the recent Act of 30 Vict. c. 23, be looked at by a Court of law for any purpose. Since that Act, it may, for some purposes, be given in evidence. In a case (1) in the Court of Queen's Bench in England, in which the nature and effect of these slips came under discussion, Mr. Justice Blackburn says, "As the slip is clearly a contract for marine insurance, and as clearly is not a policy, it is, by virtue of these enactments, not valid, that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material."

What then are the conditions of the contract which is the subject of this action? The interim note contains a proposal by the respondent to effect an insurance on the company's "usual terms and conditions," and the interim insurance is made subject to these conditions. If the contract of the parties had come to be executed, the company would perform it by issuing a policy, subject to its own conditions, if it could legally do so. Indeed, if the assured so required, it would be obligatory on the company to perform it in this manner. In the view their Lordships take of the Act in question, the company might, conformably with its enactments, issue a policy with its own conditions, provided that care was taken to print the statutory conditions, and shew the variations from and the additions to them which its own conditions present, in the manner prescribed. They think that it ought to be presumed that the company would thus perform the contract when it came to issue a policy; and this being so, that its own conditions ought to be read into the interim contract to the extent to which they might lawfully be made a

(1) *Ionides* v. *Pacific Insurance Company*, Law Rep. 6 Q. B. 685.

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part of the policy when issued, by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the Court or judge.

For these reasons, their Lordships think that the judgment of the Court of Queen's Bench discharging the Appellant's rule for setting aside the verdict for the Plaintiff, and the judgments affirming it, ought to be reversed, but their Lordships do not see their way to decide the question which now arises, and was not determined by the judge who tried the action, or by any of the Courts in Canada, whether the company's condition with respect to the quantity of gunpowder kept in the building containing the property insured is just and reasonable. They think the rule nisi should be kept open, and the action remitted to the Court of Queen's Bench in order to the trial of this question, with a direction that the rule be disposed of according to the decision that may be come to upon it, and they will humbly advise her Majesty to this effect.

The Appellants, though successful on other points, having failed on the important question of the validity of the Ontario statute, on which special leave to appeal from the judgment of the Supreme Court was granted by this Board, their Lordships think it right to make no order as to the costs of these appeals.

Solicitors for appellants: *Bompas, Bischoff, & Dodson.*
Solicitors for respondent: *Johnston & Harrison.*

[PRIVY COUNCIL.]

THE HON. JOHN AUGUSTUS CHASTEAUNEUF . . . . . } APPELLANT;

AND

ANDRÉ HENRI CAPEYRON AND JULES DELANGE . . . . . } RESPONDENTS.

J. C.* 1881 Nov. 17. 1882 Jan. 21.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF MAURITIUS.

Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 55, 58—*Registration of British Ship—Sale by Licitation—Transfer.*

The transfer of a British ship is governed by the express provisions of the Merchant Shipping Acts, which make a clear distinction between the legal estate and mere beneficial interests therein:—

Held, that a sale by licitation of a British ship (or of a share therein) without a conveyance by bill of sale did not create such an interest in the purchasers as rendered it compulsory on the Registrar, under the Merchant Shipping Act, 1854, to register them as owners, and that the Registrar was right in refusing so to do, and to erase from his books the inscriptions contained in the register against the ship in the names of the mortgagees.

Held, also, that a purchaser under a judicial sale of a beneficial interest in a British ship is not entitled to be registered as owner of it. There is no provision in the Merchant Shipping Acts which authorizes the registrar to erase entries of mortgages. In case of their having been duly discharged, an entry to that effect may be made under sect. 68 of the Act of 1854.

APPEAL from an order of the Supreme Court (April 17, 1879), whereby it was ordered that the appellant should register the respondents as owners of a certain British barque called the *Barentin*, and expunge from his books certain entries which appeared on the register against the said ship.

The facts of the case appear in the judgment of their Lordships.

The Attorney-General (*Sir Henry James*, Q.C.), and *A. L. Smith*, for the appellant.

The respondents did not appear.

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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1882. Jan. 21. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from a rule made by the Supreme Court of Mauritius, whereby it was ordered that the Collector of Customs at Port Louis in Mauritius do register in his books the British barque *Barentin* under the name of Messrs. Capeyron & Delange, of Port Louis, and whereby it was further ordered that the said Collector of Customs do erase from his books the inscriptions which appear therein against the said ship, the creditors having accepted to exercise their rights upon the sale price deposited with the Master of the Court. That rule was obtained upon the application of Messrs. Capeyron & Delange, the respondents, who claimed as purchasers of the barque at a sale by licitation.

The appellant was the Collector of Customs at Port Louis, and in that capacity was registrar of British ships at that port. The barque was a British ship, and was registered at Port Louis in the name of Aimé Docinthe, a British subject, as the sole proprietor thereof, and in the names of Henry Capeyron, Emile Coiffe, and John Ferguson, as joint mortgagees, for $8000, with interest at 9 per cent.

The sale by licitation was ordered by the Supreme Court in a suit in which Marie Léonie Lilia François, as one of the heiresses of the late Jean Eliacin François, deceased, was plaintiff, and Aimé Docinthe, the registered owner of the barque, and the guardian and sub-guardian respectively of certain minors, heirs of the said Jean Eliacin François, were defendants.

In the order for the sale made in that suit it was directed to take place before the Master of the Court according to law, and in the conditions under which the sale was directed by the Court to take place, the sale was described as a judicial sale as regards the heirs François, and by licitation as regards Aimé Docinthe, of the barque *Barentin*, therein described as belonging for one-half to the estate and succession of the late Jean Eliacin François, and the other half to Aimé Docinthe. Neither the judgment of the Supreme Court by which the sale was ordered nor the grounds upon which it was based are before their Lordships. The registrar was ordered to register the barque under the names of the

respondents upon the production of the memorandum of conditions under which the sale by licitation took place before the Master, together with the award of that officer, and upon the making and signing by the respondents of the declaration and statements required by sect. 58 of the Merchant Shipping Act, 1854, and by form marked H in the schedule thereto.

It would be unnecessary, even if their Lordships had the means for so doing, to inquire into the validity of the order for sale; that order was binding upon the parties to the suit, and the substantial question to be determined in this appeal is, whether the registrar of British ships was bound to register as owners of the barque the purchasers under the award of the Master made upon the sale by licitation. Their Lordships have had the benefit of the arguments of the learned Attorney-General and Mr. Smith on behalf of the appellant, but the respondents did not appear. Their Lordships have carefully considered the case, and have arrived at the conclusion that the registrar was right in refusing to register the respondents as owners of the barque, and to erase from his books the inscriptions contained in the register against the barque in the names of the mortgagees.

The determination of the question, so far as it relates to the obligation on the part of the registrar to register the respondents as owners, depends principally upon the proper construction of the 55th and 58th sections of the Merchant Shipping Act, 1854.

The 55th section enacts that a registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale, and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify it to the satisfaction of the registrar, and shall be according to the form marked E in the schedule to the Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, one or more witnesses. By sect. 57 it is enacted that every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration required by sect. 56 to be made by a transferee, and that the

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registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale. By the 58th section it is enacted that if the property in any ship, or in any share therein, becomes transmitted in consequence of the death or bankruptcy or insolvency of any registered owner, or in consequence of the marriage of any female registered owner, *or by any lawful means other than by a transfer according to the provisions of the Act*, such transmission shall be authenticated by a declaration of the person to whom such property has been transmitted, made in the form marked H in the schedule to the Act, and containing the statements thereinbefore required to be contained in the declaration of a transferee, or as near thereto as circumstances permit, and in addition a statement describing the manner in which and the party to whom such property has been transmitted.

The form marked H contains forms applicable to the cases of bankruptcy, insolvency, death, and marriage respectively, but no form applicable to any other means of transmission. In each of these cases, the marriage, the bankruptcy or insolvency, or the death of the registered owner has to be declared, and by sect. 59 the declaration has to be accompanied with the proof required by that section of the transmission by such means of the property in the ship or in the share thereof *from the registered owner* to the person entitled by such transmission; and then by sect. 60 it is enacted that the registrar, upon the receipt of such declaration so accompanied as aforesaid, shall enter the name or names of the person or persons entitled under such transmission in the register book as the owner or owners of the ship or share therein in respect of which such transmission has taken place, and such persons, if more than one, shall, however numerous, be considered as one person only as regards the rule therein-before contained relating to the number of persons entitled to be registered as owners. The latter portion of the section refers to the enactment in sect. 37 that, subject to the provisions with respect to joint owners or owners by transmission, not more than thirty-two individuals shall be entitled to be registered at the same time as owners of any one ship.

So strictly were the provisions of the earlier statutes relating

to the transfer of British ships interpreted, that it was held by Lord Eldon that the doctrine of implied trust in a Court of Equity could not be extended to the case of a British registered ship where the title accrued *by an act of the parties* other than a transfer made in accordance with the provisions of the Merchant Shipping Acts. See *Ex parte Yallop* (1) and *Curtis* v. *Perry* (2). His Lordship, however, drew a clear distinction between such a case and a trust implied by law not arising out of an act in which the parties claiming the beneficial interest had joined.

In the case of *Curtis* v. *Perry* (3) his Lordship said, "I desire it to be distinctly understood that I give no opinion upon the effect of those two Acts of Parliament in cases of trusts implied by law and not arising out of an act in which the contracting parties join." And again, in *Ex parte Yallop* (4), "The case of *Curtis* v. *Perry* (2), though it does not rule this case, furnishes a strong intimation of my opinion that the distinction between trusts by operation of law *unconnected with acts of the persons claiming interests*, and trusts, in a sense perhaps by operation of law, *but arising out of the acts of the parties, not regulated by the Act of Parliament*, is founded on principle."

The decision in *Ex parte Yallop* (1) was followed in the case of the *Liverpool Borough Bank* v. *Turner* decided by Lord Hatherley, then Vice-Chancellor Wood, in 1 Johnson and Hemming's Reports, p. 159, upheld on appeal by Lord Campbell in 1 Maritime Law Cases, p. 21. In that case the Vice-Chancellor pointed out a distinction between the Merchant Shipping Act, 1854, and the former statutes, viz., that in the former statutes the Legislature declared that an unregistered contract should have no effect at law or in equity, and that those words were left out in the Act of 1854, and this after they had been the subject of express decisions (p. 171). But, notwithstanding that distinction, it was held that an unregistered contract to assign an interest in a ship, when required as a security for past and future advances, was inoperative even in equity. In his judgment in that case Vice-Chancellor Wood referred to sect. 58 with reference to the contention that the Legislature, in the Act of 1854, intended to

(1) 15 Ves. 66.
(2) 6 Ves. 739.
(3) 6 Ves. at p. 746.
(4) 15 Ves. at p. 70.

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depart from its general policy of requiring all transfers to be effected by the specified methods; he said, "The phrase which strikes me as the strongest in favour of such a contention is that which is found in the 58th section, which speaks of the transmission of the property in a ship by death, bankruptcy, marriage, 'or by any lawful means other than by a transfer according to the provisions of this Act.' That is certainly a very strong expression, but the phrase must be looked at in connection with the context, and then you see that there cannot be any reference to equitable interests created by way of contract, because the transmission is directed to be authenticated by a declaration in the form marked H in the schedule which contains forms of statement that the owner is a natural-born subject, and also certain forms applicable to the transmission by death, marriage, bankruptcy, and insolvency" (p. 174). Then, after referring to sects. 59 and 60, his Honour proceeded: "It is clear that these provisions cannot possibly apply to a contract for the sale of a ship, and, whatever may have been pointed at by the words 'transmission by any lawful means other than by a transfer according to the provisions of this Act,' it could not have been intended that any person should be at liberty to go to the registrar with a contract for sale in his possession, and insist upon having it registered."

The above decisions are referred to not for the purpose of shewing that a beneficial interest cannot now be created by implication or by a contract neither registered nor made according to the provisions of the Merchant Shipping Act, 1854, but for the dicta of and the principles laid down by the learned judges in construing the earlier statutes. The law has been altered by the 25 & 26 Vict. c. 3, s. 63, passed since those cases were decided. By that section it is enacted that the expression "beneficial interest" whenever used in the second part of the principal Act (i.e. the Act of 1854) includes interests arising under contract and other equitable interests, and the intention of the said Act is that without prejudice to the provisions contained therein for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the

provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interests therein in the same manner as equities may be enforced against them in respect of any other personal property.

It may be assumed for the purpose of argument that as regards ordinary moveables the award of the master to a purchaser on a sale by licitation vests the property in him without any deed or other conveyance, and that according to the law of Mauritius there is no distinction between legal and equitable estates. But the transfer of a British ship is not governed by the rules applicable to moveables in general, but by the express provisions of the Merchant Shipping Acts which make a clear distinction between the legal estate and mere beneficial interests in a British ship.

It must be borne in mind that by sect. 43 of the Merchant Shipping Act, 1854, it is enacted that no notice of a trust, express, implied, or constructive, shall be entered in the register book or receivable by the registrar. It may be admitted that the sale by licitation without a conveyance by bill of sale created a beneficial interest in the purchasers; but the question is not whether the sale by licitation created a trust for or a beneficial interest in the purchasers, but whether it created such an interest in them as rendered it compulsory upon the registrar to register them as owners. That still depends upon the proper construction of the 58th section of the Act of 1854.

Their Lordships are of opinion that the words "or by any lawful means other than by a transfer according to the provisions of this Act" in that section must be restricted and construed as comprehending only transmissions of the same nature as those previously enumerated in the section. If this were not so they would include any assignment by a registered owner not made according to the provisions of sect. 55 of the Act of 1854, and would in effect nullify the provisions of that section.

It must be observed that there is a clear distinction made in sects. 55 and 58 between a "transfer" and a "transmission," the same distinction is also made in sects. 73 and 74 and the Form L in the schedule as regards the transfer and transmission of mortgages.

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In their Lordships' opinion, a transmission, in order to be of the same nature as a transmission by bankruptcy, insolvency, death, or marriage, must be a transmission by operation of law, unconnected with any direct act of the party to whom the property is transmitted, and that a transmission to a purchaser at a sale by licitation is not such a transmission, inasmuch as it is connected with and is the direct consequence of an act of the person who applies for the order, and another act of the person who purchases, and to whom the property is transmitted. This view of the case is supported by sect. 103, clause 3, when read in conjunction with sect. 55, for if a transfer by a judicial sale to a purchaser not qualified to be the owner of a British ship were a transmission, there would be no reason for placing him in a different position from a purchaser under s. 55. In the present case the purchasing and paying the purchase-money for the ship by the purchasers was the act upon which the Master's award was based, and, admitting that the adjudication and award of the Master passed a beneficial interest to the purchasers without any further conveyance, the interest was not such as to entitle them to be registered as owners.

Further, it may be remarked that, so long as Docinthe was registered as sole owner, the interest of the heirs François could not have been such as would have entitled a purchaser of it under a judicial sale to be registered as the owner of it.

In the case of *The Sisters*, heard before the High Court of Admiralty in 1804 (*vide* Robinson's Admiralty Reports, vol. 5, p. 159), Lord Stowell observed, "According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the maritime Courts of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance known only to the law of England. It is what the maritime law expects, what the Court of Admiralty would, in its ordinary practice, always require, and what the legislature of this country has now made absolutely necessary, with regard to British subjects, by the regulations of the statute law." This, no doubt, was before the introduction of the transmission section, but the remark is applicable to all cases in which ships

are transferred by purchase and sale, by whomsoever the sale is effected.

It may be stated, in corroboration of the view of the case taken by their Lordships, that upon a sale of a ship in execution of a judgment the sheriff passes the property by bill of sale, and their Lordships understand that, although upon the sale of a ship by order of the High Court of Admiralty in a judgment in rem, the vessel becomes the property of the purchaser, it is the practice for the purchaser to procure a bill of sale from the marshal or commissioner, in order to entitle him to be registered in accordance with the Merchant Shipping Act, 1854.

The above view of their Lordships renders it almost unnecessary to say a word as to the order to erase the names of the mortgagees from the register, except that it is clearly invalid; but it may be pointed out that the mortgagees were no parties to the proceedings for sale by licitation; that that proceeding was not a judgment in rem; that the mortgagees were not called upon by the rule nisi to shew cause against it; and that the only consent on the part of the mortgagees to forego their rights against the ship, and to exercise their rights upon the sale price, was upon the hearing of the rule nisi. Such a consent was not an act which would have justified the registrar in making an entry on the register under sect. 68 of the Act of 1854, that the mortgage had been discharged; still less did it render it obligatory upon him, or even authorise him to erase the mortgages from the register. Such a proceeding, even if the mortgages had been discharged in the manner pointed out by the Act, would have been wholly unwarranted. There is no provision in the Acts which authorises the registrar to erase entries of mortgages upon their being discharged, and it would be in violation of the principle of the Registration Acts to erase any entries which appear on the face of the register.

For the above reasons their Lordships will humbly advise Her Majesty to rescind the order above-mentioned, and to order that the rule to shew cause of the 13th of March, 1879 be discharged with costs.

The respondents must pay the costs of this appeal.

Solicitor for appellant: *Solicitor to the Treasury.*

[PRIVY COUNCIL.]

J. C.* 1881 July 13, 14, 15. 1882 Jan. 21.

THE REV. ROBERT DOBIE . . . . . APPELLANT;

AND

THE "BOARD FOR THE MANAGEMENT OF THE TEMPORALITIES FUND OF THE PRESBYTERIAN CHURCH OF CANADA IN CONNECTION WITH THE CHURCH OF SCOTLAND," AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

British North America Act, 1867, ss. 91, 92, 129—*Canada Act*, 22 *Vict.* c. 66—*Invalidity of Quebec Act*, 38 *Vict.* c. 64—*Right to sue—Powers of Synod.*

The powers conferred by the British North America Act, 1867, s. 129, upon the provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867.

Held, that 22 Vict. c. 66 (of the Parliament of Canada), which created a corporation, having its corporate existence and rights in the provinces of Ontario and Quebec, could not be repealed or modified by the Legislature of either province or by the conjoint operation of both, but only by the Parliament of the Dominion.

Held, further, that the Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation created by the Canadian Parliament and substitute a new one; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the province, was invalid.

Canada Insurance Company v. *Parsons* (*ante*, p. 96), approved and distinguished.

In a suit for a declaration of the invalidity of the Quebec Act and relief: *held*, that the plaintiff as a contributor to the fund affected by 22 Vict. c. 66, was entitled to sue, and that his suit was not barred by reason of the Quebec Act having been passed in conformity with the resolution of a synod of the Church to which he belonged.

APPEAL on special leave from a judgment of the Court of Queen's Bench (June 19, 1880) affirming a judgment of the Superior Court of the District of Montreal (Dec. 29, 1879).

* *Present*:—LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The subject-matter of the appeal was a certain fund eventually known as the "Temporalities Fund." The Acts of Parliament which relate to the creation of the fund are 14 Geo. 3, c. 83, 31 Geo. 3, c. 31, 7 & 8 Geo. 4, c. 62, 3 & 4 Vict. c. 78, and 16 Vict. c. 21.

In pursuance of authority given by 16 Vict. c. 21, the province of Canada passed the Act 18 Vict. c. 82, in consequence of which the Presbyterian Church of Canada in connection with the Church of Scotland (the appellant being one of its members) in accordance with a resolution of its Synod, dated the 11th of January, 1855, arranged with the Government for the creation of a fund (called the Temporalities Fund) of £127,448 5*s.*; and an Act of incorporation for the management thereof was obtained, being 22 Vict. c. 66, of the province of Canada, in accordance with which a Board was elected and administered the fund thereunder.

In the year 1874 it was determined to unite the said Church with three other Churches. Subsequently Ontario Act (38 Vict. c. 75) and Quebec Act (38 Vict. c. 62) were passed to give effect to such union; and contemporaneously therewith Quebec Act, 38 Vict. c. 64, was passed to amend Canadian Act, 22 Vict. c. 66, with a view to the union of the four Churches and to provide for the administration of the Temporalities Fund.

On the 14th of June, 1875, a Synod of the said Church resolved by a large majority (the appellant and nine others dissenting) that the union be effected, and various resolutions were adopted with that view. The appellant and the nine other dissentients protested that they and their adherents remained and still constituted the said Church.

On the 30th of December, 1878, the appellant commenced the proceedings in this suit which, together with the circumstances out of which they arose, are set out in the judgment of their Lordships.

The questions decided in this appeal are (1) as to the invalidity of Quebec Act 38 Vict. c. 64; (2) as to the plaintiff's right to sue; (3) as to the effect of the resolutions, from which he dissented.

Horace Davey, Q.C., and *McMaster*, of the Canadian Bar

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(*Fullarton* with them), for the appellant, contended that the Quebec Statutes (38 Vict. cc. 62 and 64) and the Ontario statute (38 Vict. c. 75) were in respect of the provisions material to the case ultrà vires and illegal. Reference was made to the British North America Act, 1867, s. 129, ss. 91 and 92, sub-ss. 7, 13, 16, 11. See also *L'Union St. Jacques de Montréal* v. *Belisle* (1); *Dow* v. *Black* (2); *Cushing* v. *Dupuy* (3). With regard to the meaning of property and civil rights in sect. 92, sub-sect. 13, see Todd's Parliamentary Government in British Colonies, p. 396. As to the state of the Canadian constitution before 1867, see 3 & 4 Vict. c. 35, s. 42, and 3 & 4 Vict. c. 78, s. 3.

It was also contended on behalf of the appellant that the Canadian Act, 22 Vict. c. 66, was still in force, and valid and binding on the respondent corporation and the fund in suit. By virtue thereof the respondents individually and the respondent corporation have acted ultrà vires and illegally in assuming to administer the fund under the provisions of the provincial Acts. The Board is at present illegally constituted. The Presbyterian Church of Canada in connection with the Church of Scotland is the body beneficially interested in the fund in suit. The Presbyterian Church in Canada is not identical therewith. This latter body is composed of a considerable party in the former body, who practically seceded therefrom and formed a union with three other Churches, becoming a new corporation by virtue of the said provincial Acts which purported to transfer to it the funds of all four Churches. The appellant and nine others were opposed to that union, and claim that they are now the Presbyterian Church of Canada in connection with the Church of Scotland, a corporation created by the Canadian statute, and exclusively entitled to the Temporalities Fund. Neither the provincial Acts, nor a resolution of a Synod of each of the four churches declaring that the United Church was identical with itself and possessed of the same authority, rights, privileges, and benefits, were operative to establish any identity between the United Church and the corporation created by 22 Vict. c. 66.

The appellant's locus standi is as a minister of the Synod of the

(1) Law Rep. 6 P. C. 31. (2) Law Rep. 6 P. C. 272.
(3) 5 App. Cas. 415.

Presbyterian Church of Canada in connection with the Church of Scotland, and as one of those entitled in 1853 and ever since to share in the proceeds of the Clergy Reserve Fund, and as one of the founders of the Temporalities Fund under the minutes of the synod of January 11, 1855, and as interested in that fund under 22 Vict. c. 66, and the other statutes in that behalf. He claims that the Presbyterian Church in Canada is not entitled to the rights, property, and status of the Church to which he belongs, and which is alone entitled to the rights and property reserved thereto by 22 Vict. c. 66.

Reference was made to *Attorney-General* v. *Welsh* (1); *Attorney-General* v. *Munro* (2); *Attorney-General* v. *Murdoch* (3); *Shore* v. *Wilson* (4); *Attorney-General* v. *Pearson* (5).

Benjamin, Q.C., and *J. L. Morris* of the Canadian Bar (*Jeune* with them), for the respondents, contended that the provincial Acts in question were all of them within the scope of provincial legislative authority, and were valid and binding Acts. It is not the case that the powers of the dominion and provincial Legislatures are mutually exclusive. If this corporation, deriving its origin from the Canadian Parliament, had property in two provinces, the provincial Legislatures might annex separate incidents to that property. The Act impugned in this case is within sect. 92, sub-sects. 7, 11, 13 of the Act of 1867; and, moreover, the subject of the Quebec Act (38 Vict. c. 64) was provincial, the domicil of the respondent corporation being in Montreal, and its funds invested in the province of Quebec. If either provincial Legislature was singly incompetent to repeal or amend a Canadian Act, yet the conjoint operation of both Legislatures was adequate for that purpose.

It was further contended that the appellant seceded from the Presbyterian Church of Canada in connection with the Church of Scotland, and by his secession ceased to be a minister in connection therewith, and ceased to have any claim, or to be entitled to any share of the fund in suit. The history and constitution of

(1) 4 Hare, 572.
(2) 2 De G. & S. 122.
(3) 7 Hare, 445, and on appeal, 1 De G. M. & G. 86.
(4) 9 Cl. & F. 355.
(5) 3 Mer. 409.

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that Church are such that its Synod had full power to effect a union with the other three Churches without destroying its identity. In 1844 its Synod passed an Act declaring its supreme and uncontrolled jurisdiction, discipline, and government in regard to all matters ecclesiastical and spiritual. The appellant assented to that Act by a formal instrument at the time of his ordination. He was therefore bound by the resolutions in favour of union, and being bound by the resolutions he was estopped from objecting to the validity of the statute which carried them into effect. There is evidence to shew that the Church remained the same both before and after the union, and that the Church of Scotland in Scotland recognised and approved the union. If the Church had a right to effect the union, the property followed, and the respondents could not be deprived thereof by doing a lawful thing in a lawful way. Moreover, the rights of persons entitled to beneficial interests in respect of the fund in question were unaffected by the union, or by the provincial Acts. The claim of the appellant was merely to a certain payment out of the fund, and there was no allegation or evidence of a demand and refusal in respect of such claim.

Davey, Q.C., replied.

1882 *Jan.* 21.

The judgment of their Lordships was delivered by

LORD WATSON:—

The first question raised in this appeal is, whether the Legislature of the province of Quebec had power, in the year 1875, to modify or repeal the enactments of a statute passed by the Parliament of the province of Canada in the year 1858 (22 Vict. c. 66), intituled "An Act to incorporate the Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland."

The fund subject to the administration of the Board constituted by the Act of 1858 consisted of a capital sum of £127,448. 5*s*. sterling, which was paid by the Government of Canada under the following circumstances:—The ministers of the Presbyterian Church of Canada, in connection with the Church of Scotland, were entitled, by virtue of certain Imperial statutes, to an endow-

ment or annual subsidy out of the revenues derived from colonial lands, termed clergy reserves, and from moneys obtained by the sale of portions of these lands, supplemented, when necessary, from the Exchequer of Great Britain. But this connection between the Presbyterian Church and the State was at length dissolved. In 1853 an Act was passed by the British Parliament (16 Vict. c. 21), authorizing the Legislature of the province of Canada to dispose of the clergy reserves, and investments arising from sales thereof, but reserving to the clergy the annual stipends then enjoyed by them, and that during the period of their natural lives or incumbencies. In 1855 the Legislature of Canada, in exercise of the power thus conferred, enacted that all union between Church and State should cease, and that those ministers who were admitted to office after the 9th of May, 1853, being the date of the Act, 16 Vict. c. 21, should receive no allowance from the Government. It was, however, provided that the rights of ministers entitled at that date to participate in the state subsidy, should be reserved entire, power being given to the Governor General in Council to commute the annual stipend payable to each individual so entitled to the capital value of such stipend, calculated at six per cent. on the probable life of the annuitant.

All the ministers interested consented to accept the statutory terms of commutation, and agreed to bring the amounts severally payable to them into one common fund, to be settled for behoof of the Presbyterian Church of Canada in connection with the Church of Scotland. In accordance with resolutions unanimously adopted by the Church in Synod assembled on the 11th of January, 1855, they further agreed that the interest of the fund should be devoted, in the first instance, to the payment of an annual stipend of £112. 10*s.* to each commutor, and that the claim next in order of preference should be that of ministers then on the roll, who had been admitted since the 9th of May, 1853. The arrangement thus effected was carried out by eight Commissioners duly appointed for that purpose, of whom three were ministers and five were laymen. They received payment of the commutation moneys to the amount already stated; and in order to provide for the management of the fund thus obtained, the

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Legislature of the province of Canada, upon the application of the Commissioners, passed the Act 22 Vict. c. 66.

By the first clause of the Act in question the Commissioners were, along with four additional members and their successors, declared to be a body politic and corporate, by the name of the "Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland;" and the funds held by them as Commissioners were vested in the board "in trust for the said Church," subject to the condition that the annual interest thereof should remain chargeable with the stipends and allowances payable to the parties entitled thereto, in terms of the arrangement under which the fund was contributed by the commutors. It was enacted that at the first meeting of Synod held after the passing of the Act, three Commissioners, one minister and two laymen, should retire from the Board, and that seven new members, consisting of four ministers and three laymen, should be elected by the Synod. The Board thus reconstituted was composed of six ministers and six laymen, and it was provided that at each annual meeting of the Synod held thereafter two ministers and two laymen were to retire by rotation, and that four new members, two clerical and two lay, should be elected in their stead. It was expressly enacted that all members of the Board should also be members of the Presbyterian Church of Canada in connection with the Church of Scotland; and provision was made for filling up vacancies occasioned by the death or resignation of a member, by his removal from the province of Canada, or by his leaving the communion of the said Church.

In the year 1874 serious proposals had been made for an incorporative union between the Presbyterian Church of Canada in connection with the Church of Scotland, the Canada Presbyterian Church, the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces. The old Parliament of the province of Canada had by this time been abolished, and its legislative power had been distributed between the two provincial Legislatures of Ontario and Quebec, and the new Parliament of the Dominion of Canada, under the provisions of the "British North America Act, 1867."

With the view of facilitating the contemplated union of the Churches, an Act of the Legislature of Quebec was passed in February, 1875 (38 Vict. c. 62), in order to remove any obstruction which might arise from the form and designation of the several trusts or acts of incorporation by which the property of the Churches was held and administered. By the 11th section of that Act, it was provided that, in the event of union taking place, the members then constituting the board for the management of the Temporalities Fund, under the Act of 1858, should remain in office, and pay over the revenue to the persons previously entitled to it; that any revenue not required for that purpose should pass to and be subject to the disposal of the united Church; and that any part of the fund remaining after satisfying the claim of the last survivor of those entitled should belong to the Supreme Court of the United Church, and be applied to the aid of weak congregations. It was by the same clause enacted that vacancies occurring in the Temporalities Fund Board should not be filled up in the manner theretofore observed, but should be filled up in the manner provided by another Act of the Quebec Legislature.

The last-mentioned statute (38 Vict. c. 64), which received the assent of the Governor-General in Council upon the same day as the preceding, was passed with the professed object of amending the Act of the Parliament of the province of Canada, 22 Vict. c. 66. It was thereby enacted that, from the time when the union was effected, the annual allowances to which they were previously entitled were to be continued by the Temporalities Board to ministers and probationers then on the roll of the Presbyterian Church of Canada in connection with the Church of Scotland, and these were to be paid, so far as necessary, out of the capital of the fund, and that any surplus of revenue or capital, after satisfying these charges, should be at the disposal of the united Church. Ministers and probationers of the Church interested in the Temporalities Fund, who might decline to become parties to the union, were, however, to retain all rights previously competent to them until the same lapsed or were extinguished. The constitution of the Board of Management was altered by the 3rd and 8th clauses of the Act. The 3rd clause is in these terms: "As often as any vacancy in the Board for the management of the said Temporalities

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Fund occurs, by death, resignation, or otherwise, the beneficiaries entitled to the benefit of the said fund may each nominate a person, being a minister or member of the said united Church, or, in the event of there being more than one vacancy, then one person for each vacancy, and the remanent members of the said Board shall thereupon, from among the persons so nominated as aforesaid, elect the person or number of persons necessary to fill such vacancy or vacancies, selecting the person or persons who may be nominated by the largest number of beneficiaries, but, in the event of failure on the part of the beneficiaries to nominate as aforesaid, the remanent members of the Board shall fill up the vacancy or vacancies from among the ministers or members of the said united Church." The eighth clause enacts that the 3rd section shall continue in force until the number of beneficiaries is reduced below fifteen, upon which occurrence the Board is to be continued by the remanent members filling up vacancies from among the ministers or members of the united Church. By the 10th section it was declared that the Act should come into force as soon as a notice was published in the Quebec *Official Gazette* to the effect that the union had been consummated, and that the articles of union had been signed by the moderators of the respective Churches.

On the 14th of June, 1875, the Synods of the four Churches met at Montreal, and in each a resolution was carried in favour of union. In the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, it was resolved, by a very large majority of its members, that the four Churches should be united and form one Assembly, to be known as "The General Assembly of the Presbyterian Church in Canada," and that the united Church should possess the same authorities, rights, privileges, and benefits to which the Presbyterian Church in Canada in connection with the Church of Scotland was then entitled, excepting such as had been reserved by Acts of Parliament. The minority, which consisted of the Appellant, the Rev. Robert Dobie, and nine other members, dissented from the action of the Synod, and protested that they, and those who might choose to adhere to them, remained and still constituted the Presbyterian Church of Canada in connection with the Church of Scotland.

On the 15th of June, 1875, the majority of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, and the Synods of the other uniting Churches, met in general assembly, when the articles of union were signed by the moderators of each of the four Churches; and thereupon one of the moderators, with the consent and concurrence of the rest, declared the four Churches to be united in one Church, represented by that its first general assembly, to be designated and known as "The General Assembly of the Presbyterian Church in Canada." Notice of the union having been thus consummated was duly published in the Quebec *Official Gazette*.

After publication of the notice the constitution of the Board for managing the Temporalities Fund was altered, and the fund administered in conformity with the provisions of the Quebec Act, 38 Vict. c. 64. In December, 1878, the Rev. Robert Dobie, who, with the other members of the protesting minority of 1875, and their adherents, maintains that they alone represent and constitute the Presbyterian Church of Canada in connection with the Church of Scotland, instituted, by petition to the superior Court for Lower Canada, the proceedings in which the present appeal has been taken. The leading conclusions of the petition are to have it adjudged and declared, (1) that the Legislature of Quebec had no power to alter the constitution of the Board or the purposes of the trust created by the Canadian Act, 22 Vict. c. 66, and consequently that the administration of the trust as carried on in terms of the Provincial Act of 1875 is illegal; (2) that the protesting minority of the Synod of 1875, and its adherents, are now the Presbyterian Church of Canada in connection with the Church of Scotland, and that certain ministers of the United Church, who were members of the majority, had, by reason of the union, forfeited all right to participate in the benefits of the Temporalities Fund; and, (3) to have an injunction against the Board as then constituted, acting in prejudice of the rights of the Appellant, and others beneficially interested in the statutory trust of 1858. Upon the 31st of December, 1878, the appellant's application was heard before Mr. Justice Jetté, who made an order for summoning the respondents, and also issued an interim injunction, which the learned judge dissolved, after fully hearing both

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parties, on the 31st of December, 1879, and at the same time dismissed the appellant's petition, with costs. This decision was, on appeal to the Court of Queen's Bench for Lower Canada, affirmed, in accordance with the opinions of the majority of the judges.

The judgments of Mr. Justice Jettè in the Court of first instance, and of Chief Justice Dorion and Mr. Justice Monk in the Court of Queen's Bench, are based exclusively upon the competency of the Quebec Legislature to pass the Act 38 Vict. c. 64, and the consequent validity of that statute. On the other hand Mr. Justice Ramsay and Mr. Justice Tessier were of opinion that the appellant was entitled to an injunction, on the ground that the Act 38 Vict. c. 64 was invalid, and that the majority of the Presbyterian Church of Canada, in connection with the Church of Scotland, had no power to communicate any interest in the Temporalities Fund of that Church to the religious bodies with whom they had chosen to unite themselves in 1875. Mr. Justice M'Cord was of opinion, with his Brethren Ramsay and Tessier, JJ., that the Act of the Legislature of Quebec was ultrà vires, but he held that the majority of the Presbyterian Church of Canada in connection with the Church of Scotland, had undoubted power to admit into that Church, as members of it, the three religious bodies with whom they had entered into union. Consequently the learned justice, though differing in opinion from his Brethren Dorion, C.J., and Monk, J., agreed with them in result.

Whether the Legislature of Quebec had power to pass the Act 38 Vict. c. 64, is the question first requiring consideration, because if it be answered in the affirmative the case of the appellant entirely fails. The determination o that question appears to their Lordships to depend upon the construction of certain clauses in the British North America Act, 1867. There is no room in the present case for the application of those general principles of constitutional law which were discussed by some of the judges in the Courts below and which were founded on in argument at the Bar. There is really no practical limit to the authority of a supreme Legislature except the lack of executive power to enforce its enactments. But the Legislature of Quebec is not supreme; at all events it can only assert its supremacy

within those limits which have been assigned to it by the Act of 1867.

The Act of the Parliament of the province of Canada, 22 Vict. c. 66, was, after the passing of the British North America Act, 1867, continued in force within the provinces of Ontario and Quebec by virtue of sect. 129 of the latter statute, which inter alia enacts that except as therein provided all laws in force in Canada at the time of the union thereby effected, shall continue in Ontario and Quebec as if the union had not been made. But that enactment is qualified by the provision that all such laws with the exception of those enacted by the Parliaments of Great Britain or of the United Kingdom of Great Britain and Ireland, shall be subject "to be repealed, abolished, or altered by the Parliament of Canada or by the Legislature of the respective provinces according to the authority of the Parliament or that Legislature under this Act." The powers conferred by this section upon the provincial Legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. In order therefore to ascertain how far the provincial Legislature of Quebec had power to alter and amend the Act of 1858 incorporating the Board for the management of the Temporalities Fund, it becomes necessary to revert to sects. 91 and 92 of the British North America Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the Legislatures of the respective provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation on the subject the Legislature of Quebec would have been authorized by sect. 92 to pass an Act in terms identical with the 22 Vict. c. 66, then it would follow that the Act of the 22nd Vict. has been validly amended by the 38 Vict. c. 64. On the other hand, if the Legislature of Quebec has not derived such power of enactment from sect. 92, the necessary inference is that the legislative authority required in terms of sect. 129 to sustain its right to repeal or alter an old law of the Parliament of the province of Canada is

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in this case wanting, and that the Act 38 Vict. c. 64, was not intra vires of the Legislature by which it was passed.

The general scheme of the British North America Act, 1867, and in particular the general scope and effect of sects. 91 and 92 have been so fully commented upon by this Board in the recent cases of the *Citizen Insurance Company of Canada* v. *Parsons* (1) and the *Queen Insurance Company* v. *Parsons* (2) that it is unnecessary to say anything further upon that subject. Their Lordships see no reason to modify in any respect the principles of law upon which they proceeded in deciding those cases; but in determining how far these principles apply to the present case it is necessary to consider to what extent the circumstances of each case are identical or similar.

The case of the *Citizen Insurance Company of Canada* v. *Parsons* (1) comes nearest in its circumstances to the present, as in that case the appellant company was incorporated by and derived all its statutory rights and privileges from an Act of the province of Canada, whereas the Queen Insurance Company was incorporated under the provisions of the British Joint Stock Companies Act, 7 & 8 Vict. c. 110. In both cases the validity of an Act of the Legislature of Ontario was impeached on the ground that its provisions were ultrà vires of a provincial Legislature and were not binding unless enacted by the Parliament of Canada. It was contended on behalf of the Citizen Insurance Company that the statute complained of was invalid in respect that it virtually repealed certain rights and privileges which they enjoyed by virtue of their Act of incorporation. That contention was rejected, and the decision in that case would be a precedent fatal to the contention of the appellant if the provisions of the Ontario Act, 39 Vict. c. 31, and the Quebec Act, 38 Vict. c. 64, were of the same or substantially the same character. But upon an examination of these two statutes it becomes at once apparent that there is a marked difference in the character of their respective enactments. The Ontario Act merely prescribed that certain conditions should attach to every policy entered into or in force for insuring property situate within the province against the risk of fire. It dealt with all corporations, companies, and individuals

(1) *Ante*, p. 96. (2) *Ante*, p. 96.

alike who might choose to insure property in Ontario—it did not interfere with their constitution or status, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Vict. c. 64, on the contrary deals with a single statutory trust and interferes directly with the constitution and privileges of a corporation created by an Act of the province of Canada and having its corporate existence and corporate rights in the province of Ontario as well as in the province of Quebec. The professed object of the Act and the effect of its provisions is not to impose conditions on the dealings of the corporation with its funds within the province of Quebec, but to destroy, in the first place, the old corporation and create a new one, and, in the second place, to alter materially the class of persons interested in the funds of the corporation.

According to the principles established by the judgment of this Board in the cases already referred to, the first step to be taken, with a view to test the validity of an Act of the provincial Legislature is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in sect. 92. If it does not then the Act is of no validity. If it does then these further questions may arise viz., "whether notwithstanding that it is so the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial Legislature is or is not thereby overborne."

Does then the Act, 38 Vict. c. 64, fall within any of the classes enumerated in sect. 92 and thereby assigned to the provincial Legislatures? Their Lordships are of opinion that it does not; and consequently that its enactments are invalid, and that the constitution and duties of the Board for managing the Temporalities Fund must still be regulated by the Act of 1858.

It was contended for the respondents that the Quebec Act of 1875 is within one or more of these three classes of subjects enumerated in sect. 92—

> "(7.) The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province other than marine hospitals."

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"(11.) The incorporation of companies with provincial objects."

"(13.) Property and civil rights in the province."

The most plausible argument for the respondents was founded upon the terms of Class (13), but it has failed to satisfy their Lordships that the statute impeached by the appellant is a law in relation to property and civil rights within the province of Quebec.

The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the Legislature of each province would have power to deal with them so far as situate with the limits of its authority. If, by a single Act of the Dominion Parliament, there had been constituted two separate corporations, for the purpose of working, the one a mine within the province of Upper Canada, and the other a mine in the province of Lower Canada, the Legislature of Quebec would clearly have had authority to repeal the Act so far as it related to the latter mine and the corporation by which it was worked.

The Quebec Act 38 Vict. c. 64 does not profess to repeal and amend the Act of 1858, only in so far as its provisions may apply to or be operative within the province of Quebec, and its enactments are apparently not framed with a view to any such limitation. The reason is obvious, and it is a reason which appears to their Lordships to be fatal to the validity of the Act. The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an Act applicable to the two provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province. But in the present case the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province. In addition to that, the fund administered

by the Corporate Board under the Act of 1858 is held in perpetuity for the benefit of the ministers and members of a church having its local situation in both provinces, and the proportion of the fund and its revenues falling to either province is uncertain and fluctuating, so that it would be impossible for the Legislature of Quebec to appropriate a definite share of the corporate funds to their own province without trenching on the rights of the corporation in Ontario.

These observations regarding Class (13) apply with equal force to the argument of the respondents founded on Classes (7) and (11). Even assuming that the Temporalities Fund might be correctly described as a "charity" or as an "eleemosynary institution," it is not in any sense established, maintained, or managed "in or for" the province of Quebec; and if the Board incorporated by the Act of 1858 could be held to be a "company" within the meaning of Class (11), its objects are certainly not provincial.

The respondents further maintained that the Legislature of Quebec had power to pass the Act of 1875 in respect of these special circumstances: (1), that the domicil and principal office of the Temporalities Board is in the city of Montreal; and (2), that its funds also are held or invested within the province of Quebec. These facts are admitted on record by the appellant, but they do not affect the question of legislative power. The domicil of the corporation is merely forensic, and cannot alter its statutory constitution as a Board in and for the provinces of Upper Canada and Lower Canada. Neither can the accident of its funds being invested in Quebec give the Legislature of that province authority to change the constitution of a corporation with which it would otherwise have no right to interfere. When funds belonging to a corporation in Ontario are so situated or invested in the province of Quebec, the Legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by sect. 92, (2), or may impose conditions upon the transfer or realization of such funds; but that the Quebec Legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867.

Last of all it was argued for the respondents that, assuming the

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incompetency of either provincial Legislature acting singly to interfere with the Act of 1858, that statute might be altered or repealed by their joint and harmonious action. The argument is based upon fact, because in the year 1874 the Legislature of Ontario passed an Act (38 Vict. c. 75), authorizing the union of the four Churches, and containing provisions in regard to the Temporalities Fund and its Board of management substantially the same with those of the Quebec Act, 38 Vict. c. 62, already referred to. It is difficult to understand how the maxim juncta juvant is applicable here, seeing that the power of the provincial Legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed. If the Legislatures of Ontario and Quebec were allowed jointly to abolish the Board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreigner in Quebec, and the other of which would be foreign to Ontario but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities Fund falls to be applied either in the province of Quebec or in that of Ontario, and that in such amounts or proportions as the needs of the Presbyterian Church of Canada in connection with the Church of Scotland, and of its ministers and congregations, may from time to time require. The Parliament of Canada is therefore the only Legislature having power to modify or repeal the provisions of the Act of 1858.

On the assumption that the Legislature of Quebec had not power to alter the provisions of the Act, 22 Vict. c. 66, the respondents still maintain that the appellant cannot prevail in the present action, in respect that he has not sufficient interest to entitle him to sue, and that, even if he has such interest, he is barred from challenging the Act of 1875, by the resolutions of the majority of the Synod, which are said to be binding upon him.

As regards the first of these objections, it is true that the appellant's right to an annuity from the Temporalities Fund is

reserved in its integrity by the Act which he impugns, and his own pecuniary interests are, therefore, not affected by its provisions. But the appellant is not a mere annuitant, and his right to an annual allowance does not constitute his only connection with the fund. He is likewise one of the commutors—one of the persons by whom the fund was contributed for the purposes of the Act, 22 Vict. c. 66—and in that capacity he has a plain interest and consequent right, to insist that the fund shall be administered in strict accordance with law.

The second objection is derived from the resolutions in favour of union carried by the majority of the Synod of the Presbyterian Church of Canada, in connection with the Church of Scotland, upon the 14th of June 1875. The Quebec Act, 38 Vict. c. 64, deals with the Temporalities Fund in conformity with these resolutions; and it is the contention of the respondents that the appellant is bound by the resolutions, and cannot, therefore, impeach the statute which gives effect to them. That is a startling proposition. If the Legislature of Quebec was incompetent to enact the Statute of 1875, it is not easy to understand how the Synod could have power, either directly or indirectly, to validate that Act, or to set aside the enactments of 22 Vict. c. 66. The respondents do not, indeed, allege that the Synod was possessed of legislative powers, but they assert that the majority, by resolving that the fund, settled under the Act 22 Vict. c. 66, should in future be administered according to a scheme inconsistent with the provisions of the Act, bound all its members to acquiesce in that new course of administration, and to abstain from enforcing the statute law of the land. It may be doubted whether a Court of law would sustain such an obligation, even if it were expressly undertaken; but it is unnecessary to discuss that point, because their Lordships are of opinion that the respondents have failed to establish that the appellant, as a member of the Presbyterian Church in connection with the Church of Scotland undertook any obligation to that effect.

Whether the appellant is bound, as alleged by the respondents, is, in this case, a question relating exclusively to civil rights, and must therefore be dealt with as a matter of contract between him and the Synod or Church of which he was admittedly a member at

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the time when the resolutions in favour of union were carried. In the case of a non-established Presbyterian Church, its constitution or in other words the terms of the contract under which its members are associated, are rarely embodied in a single document, and must, in part at least, be gathered from the proceedings and practice of its judicatories. Every person who becomes a member of a Church so constituted must be held to have satisfied himself in regard to the proceedings and practice of its Courts, and to have agreed to submit to the precedents which these establish. The respondents were therefore justified in referring to the minutes of the Synod from 1831 to 1875, for the purpose of shewing the extent of the power vested in majorities by the constitution of the Church. The minutes, which were founded upon by counsel for the respondents, afford abundant evidence to the effect that, in all matters which the Synod was competent to deal with and determine, the will of the majority as expressed by their vote was binding upon every member of the Synod, a proposition which the appellant did not dispute. But they contain nothing whatever to shew that in cases where the administration of Church property was regulated by statute, the Synod ever asserted its right to set aside that legal course of administration, and to restrain dissentient members from challenging any departure from it.

Their Lordships are therefore of opinion that the appellant is entitled to have it declared that notwithstanding the provisions of the Quebec Act of 1875, the constitution of the Board and the administration of the Temporalities Fund are still governed by the Canadian Act of 1858, and that the respondent Board is not duly constituted in terms of that Act; and also to have an injunction restraining the respondents from paying away or otherwise disposing of either the principal or income of the fund.

The appellant in his application to the Court below asks a declaration to the effect that the fund in question is held by the respondents "in trust for the benefit of the Presbyterian Church of Canada in connection with the Church of Scotland, and for the benefit of the ministers and missionaries who retain their connection therewith, and who have not ceased to be ministers thereof, and for no other purpose whatever." It is obviously in-

expedient to make any declaration of that kind. It would be a mere repetition of the language of the Act of 1858 by which the trust is regulated and would decide nothing as between the parties to the present suit.

The appellant also seeks to have it declared that six reverend gentlemen who at and prior to the union of 1875 were members of the Presbyterian Church of Canada in connection with the Church of Scotland have ceased to possess that character, and that they have no right to the benefits of the Temporalities Fund; and he concludes for an injunction against the respondent corporation making any payment to them. Their Lordships are of opinion that these are matters which cannot be competently decided in the present action. Their decision depends upon the answer to be given to the question which Church or aggregate of Churches is now to be considered as being or representing the Presbyterian Church of Canada in connection with the Church of Scotland within the meaning of the Act 22 Vict. c. 66? But the two Churches which appear from the record to have rival claims to that position are not represented in this action; and of the six ministers whose pecuniary interests are assailed by the appellant he has only called one, the Rev. Dr. Cook, as a respondent. That question between the Churches must be determined somehow before a constitutional Board can be elected; and unless the dominion Parliament intervenes there will be ample opportunity for new and protracted litigation. It cannot be determined now because the appellant has not asked any order from the Court in regard to the formation of the new Board, and has not made the individuals and religious bodies interested parties to this cause.

Substantial success being with the appellant he must have his costs as against the respondents. But their Lordships are of opinion that neither the respondents' own costs nor those in which they are found liable to the appellant ought to come out of the trust fund which they are holding and administering without legal title. The appellant's costs must therefore be paid by the members of the respondent corporation as individuals.

Their Lordships will accordingly humbly advise Her Majesty that the judgments under appeal ought to be reversed, and that the cause should be remitted to the Court of Queen's Bench,

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Lower Canada, with directions to that Court to give effect to the declarations recommended by this Board, and also to issue in the appellant's favour an injunction and decree for costs as directed by this Board.

Solicitors for the appellant: *Simpson, Hammond, & Co.*
Solicitors for the respondents: *Bompas, Bischoff, & Dodgson.*

[PRIVY COUNCIL.]

J. C.* 1881 Dec. 6, 7, 8. 1882 Jan. 21.

THE MARCHESE FELICISSIMO APAP . DEFENDANT;

AND

THE NOBLE LUISA STRICKLAND AND GERALDO STRICKLAND . . . . . } PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL OF THE ISLAND OF MALTA.

Construction of Deed—Primogeniture.

B. by deed (1673) gave all his property to his nephew, reserving the right quoad the "bona stabilia" to establish a primogenitura. After the death of his nephew he executed a deed (1686), which recited the gift and the death of the donee without establishing the primogenitura, and directed that at the death of the donor, the donee's eldest son Martinus Antonius should succeed. The deed then contained the following clauses, under the first of which N. succeeded as a primogenitus mas and died in 1745.

1. "Scilicet quod deinde censeantur bona predicta vinculata et fideicommisso perpetuo supposita pro omnibus primogenitis maribus legittimis et naturalibus, et ex legittimo matrimonio nascituris, per directam lineam ex dicto Martino Antonio de primogenito in primogenitum in infinitum, cunctisque futuris temporibus, et sine ulla temporis perfinitione.

3. "Et in defectu primogeniti maris ex dicto Domino Martino Antonio, dicta bona pervenire debeant ac perveniant et pervenire debeant ad filios ejusdem Domini Martini Antonj, legittimos et naturales, et ex legittimo matrimonio nascituros quousque in secundo gradu nepotum dicti Domini Martini Antonij nasceretur masculus ex aliqua de filiabus dicti D. Martini Antonij legittimis et naturalibus et ex legittimo matrimonio, cui nepoti nato statim dicta bona devolvant cum onere ut supra transeundi de primogenito nepote dicti Martini Antonj in primogenitum nepotem legittimum et de legittimo matrimonio nascituru m."

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* *Present:*—SIR ROBERT J. PHILLIMORE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

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On the death without issue in 1875 of N.'s daughter's son who had succeeded under clause 3, the succession opened.

In a suit by G., the daughter's son (born 1861) of a younger sister of the deceased, claiming as the male descendant in the nearest collateral line, the defendant, the son (born 1834) of the youngest sister of the deceased, contended that he was entitled by priority of birth under the 3rd clause, and denied that G. was a primogenitus mas within the meaning of the deed:—

Held, that G. was entitled to the estate by virtue of the ordinary rules of law applicable to the primogenitura established by clause 1.

Although the primogenitura as created by clause 1 is so far qualified in favour of males as in the events which happened to devolve on G. in preference to his mother, it is not an agnatial primogenitura so as to prevent females from constituting lines of descent; line is to be considered in preference to degree, sex, or age; and therefore G. succeeds, being in a nearer collateral line, viz., that of the elder sister, than the appellant, who though born first is in the line of the younger sister.

A deviation from the ordinary mode in which a primogenitura descends is not to be construed as interfering with that mode of descent more than is necessary to give effect to such deviation; and therefore assuming that in the event contemplated by clause 3 females are to take collectively, it by no means follows that all or any of them are prevented from forming lines of descent. The clause applies only to the case therein stated, viz., when upon the opening of the succession there is no "primogenitus mas," in which case the estate devolves on females who are to be displaced by the first male born from any of them. G. being a primogenitus mas in existence at the death of the deceased, clause 3 had no operation.

APPEAL from so much of a judgment of the Second Hall of the Court of Appeal at Malta (Feb. 14, 1879) as reversed a judgment in favour of the Appellant by the Court of First Hall (Jan. 2, 1878).

The question decided in this appeal was as to the right of succession to certain estates situate in Malta, and in the record called the "Bologna Primogenitura," which was founded by instruments dated 1678, 1686, and 1696, but more especially by the one dated 1686. It arose on the death of the last possessor Count Nicolo Scebarras, the first-born son of Angela Perdicomati Bologna and the Barone Paolo Scebarras, who died on the 5th of July, 1875, without issue male or female but leaving collateral relations, and amongst others the respondents Luisa and Geraldo, who were descended from the fourth child of Angela, Francesca Apap the fifth child of the said Angela and her issue, the issue of the seventh child of the said Angela, and the appellant, the son of her youngest child.

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The genealogical table set out in their Lordships' judgment shews the relationship between the parties, and in the judgment will be found a statement of the facts of the case and the material passages of the deeds establishing the primogenitura.

Charles, Q.C., and *Wolstenholme* (*Mackey* with them), for the appellant, contended that he became entitled on his birth in immediate expectancy to the Bologna primogenitura, and that nothing had afterwards occurred to defeat that title. The first limitation in the deed of 1686 was to M. Antonio, the first-born son of Perdicomati, and then the property was to be bound by a perpetual trust "pro omnibus primogenitis maribus," &c. A substitution clause follows, giving a power of substitution of one son for another in every holder, and then a limitation in defectu, &c., ad filios, a word which ought to be filias. Both Courts have so treated it. The limitation provides for the case of a male from a female. Thus the first limitation is directed to sons, the second limitation to daughters, but to be divested on the instant of a son's birth. The "et sic" clause is a part of the preceding limitation; while the "maribus et feminis" in the next clause refers to the failure of the two preceding limitations [SIR ROBERT P. COLLIER:—I should read it generally of general failure.] The limitation to Anna Maria's son, to her exclusion, shews that the Canon intended an agnatial primogenitura. Otherwise it was a primogenitura completely regular, in which case the first respondent would be entitled and not the second.

With regard to "primogenitus mas" that expression means an heir through an exclusively male line, except in the case of a grandson by a daughter of the last holder, and certain other cases. Nicola the younger was not a primogenitus mas, but came in under the latter limitations "in defectu," &c., and under the "quousque" clause. The appellant is entitled by priority of birth, there being as between daughters no preference in line; he had on his birth in 1834 an immediate expectancy now become a certainty. It was only liable to be defeated if Nicola the younger had had a primogenitus mas. The first limitation in the deed contemplates either a purely male agnatic descent, sons of sons, or else a primogenitus mas born of the last possessor.

The quousque clause applies wherever you have to resort to a female whether alive or dead, and whether she takes or not. Three cases are covered by the deed: (*a*) where daughters survive the last holder, they take collectively till a son is born to one of them; (*b*) where daughters survive the last holder, themselves having sons, the eldest son takes though born of the younger daughter; (*c*) where there are sisters of the last holder, the same rule applies mutatis mutandis. In such cases line is not considered, only priority of birth. The second limitation in the deed applies to collaterals as well as lineals.

Nicola senior was the last primogenitus mas. On the death of Nicola junior, who derived stock from the five daughters collectively, without issue, it is as though he never existed. The defectus mentioned in the grant had happened, and the first limitation was exhausted. Then the respondent not being a primogenitus mas under the first limitation, must like all others who claim under the five ladies, take as Nicola the younger did, under the second limitation. But the appellant comes in before him.

With regard to the ultimate limitation, supposing it to have come into play, the appellant would be the right person to take, as the nearest in degree.

Matthews, Q.C. (*Benjamin*, Q.C., and *Seward Brice* with him), for the respondent, contended that the first object of the deed was to found a primogenitura, wholly opposed to principles of descent by civil law under which succession goes by degree. The first limitation of the deed is a departure from strict primogenitura. It introduces a qualification. The holder must be a primogenitus mas, and then is the son of a daughter a primogenitus mas? He is in the line, and there are no words to shew that the mas must be the son of a son. On the contrary, see 5th paragraph, "et casu quo . . . maribus et feminis." The nearest stock when the succession opened was Angela. No authority has been cited for the agnatic character of the first limitation. The authority against it is overwhelming. All nine decisions of the Rota Romana given in the record are against it. The quousque clause and the ultimate limitation properly con-

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strued are confirmatory of the ordinary law, succession being per directam lineam, and not per lineam masculinam. And by the general law, if a female took at all she would not have her estate divested by a son, while by the deed such defeasance takes place. He referred to Torre "De primogenituris et majoratibus Italiæ," vol. i. c. 25, pp. 156, 7, and to a decision vol. iii. p. 201, shewing that under a general limitation in favour of masculi descendentes of the kind in this deed, succession is not agnatic. De Luca (John Baptist, a Cardinal), De Fidei Commiss., vol. x., p. 47, shews that a general limitation in favour of primogeniti mares or masculi descendentes is a limitation in favour of masculi e feminis as well as masculi e masculis. Consequently, females must have capacity to form lines of descent, and they will take in ordinary primogenial succession. Luisa, no doubt, would have taken quousque if the succession had opened before Geraldo was born. The quousque clause applies in the first instance, and in its terms, to the daughters of M. Antonio; yet the masculine word is used to include children which must on the hypothesis dealt with be female. It was intended to deal with the case where the last possessor had only female issue, and cannot be extended to the case where he has male issue, without involving absurdity. The son is preferred to his mother if living at the date of the sucession opening; otherwise he does not dispossess her. De Luca, De Fidei Commiss., vol. x. p. 23; Discourse No. 11, p. 53; Discourse, No. 26.

As to the ultimate limitation, it really is out of the case. The line of M. Antonio is not exhausted.

Charles, Q.C., replied.

1882 *Jan.* 21.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The suit giving rise to this appeal was brought by Mrs. Strickland, widow of Captain Strickland, on her own behalf, and as tutrix and curatrix of her son Geraldo, in order to have it declared that she, or her son, is entitled to certain lands in Malta, settled in primogeniture by Canon Bologna, together with other lands since annexed thereto, and to recover possession of them from the defendant, the Marchese Felicissimo Apap. The Court of the

First Hall in Malta gave judgment for the defendant. On appeal the Court of the Second Hall reversed this judgment so far as it was against Geraldo, and gave judgment in his favour. Mrs. Strickland has not appealed, and the contest is now between Geraldo and the Marchese Apap.

Canon D. Alessandro Bologna, by a deed dated the 23rd of October, 1673, gave all his property to his nephew Pietro Perdicomati Bologna, reserving the right, quoad the "bona stabilia," to establish a "primogeniture," and charging the donee to do this if he survived the donor.

The Canon, having survived Pietro, executed, on the 11th of May, 1686, the deed on the construction of which this cause depends. After reciting the previous deed,[1] and the death of Pietro without establishing the primogenitura, the deed proceeds thus (the clauses are numbered for convenience of reference):—

1. "Hinc est, quod hodie presenti die pretitulato prefatus Perillustris et Admodum Rev. D. Don Alexander Bologna J. U. D. Canonicus Cathedralis Ecclesiæ Melivetanæ, Prothonotarius Apostolicus, cognitus presens coram nobis per se et suos, non vi sed sponte declaravit, et declarat, dictam primogenituram regulari debeat modo infrascripto, scilicet quod bona stabilia omnia et singula per eundem Dominum D. Alexandrum dicto quandam D. Petro donata post obitum dicti D. Don Alexandri perveniant, et pervenire debeant, ad dictum Dominum Martinum Antonium Perdicomati Bologna primogenitum natum et procreatum ex dicto quondam D. Petro et D. Eugenia olim jugalibus, et deinde censeantur bona predicta vinculata et fideicommisso perpetuo supposita pro omnibus primogenitis maribus legittimis et naturalibus et ex legittimo matrimonio nascituris, per directam lineam ex dicto Martino Antonio de primogenito in primogenitum in infinitum, cunctisque futuris temporibus, et sine ulla temporis perfinitione.

2. "Cum hoc, quod ipse Dominus Martinus Antonius possit et libere valeat et sui possint et libere valeant in infinitum, eligere et nominare in locum primogeniti alterum ex alijs filijs maribus legittimis et naturalibus.

3. "Et in defectu primogeniti maris ex dicto Domino Martino Antonio, dicta bona pervenire debeant ac perveniant et pervenire

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debeant ad filios ejusdem Domini Martini Antonj, legittimos et naturales, et ex legittimo matrimonio nascituros quousque in secundo gradu nepotum dicti Domini Martini Antonij nasceretur masculus ex aliqua de filiabus dicti D. Martini Antonij legittimis et naturalibus et ex legittimo matrimonio, cui nepoti nato statim dicta bona devolvant cum onere ut supra transeundi de primogenito nepote dicti Martini Antonij in primogenitum nepotem legittimum et de legittimo matrimonio nasciturum.

4. "Et sic, tam cum extiterint mares quam cum non extiterint, ipse D. Donator jussit et mandavit observari perpetuo, et cunctis futuris temporibus et sine ulla perfinitione temporis, in linea descendentium ex supradicto Domino Martino Antonio.

5. "Et casu quo dictus Dominus Martinus Antonius decesserit sine filijs nepotibus pronepotibus alijsque ex eo descendentibus legittimis et naturalibus ac ex legittimo matrimonio natis maribus et feminis, vel cum talibus descendentibus et eisdem morientibus sine similibus descendentibus in infinitum, dicta bona ut supra donata devolvantur ad filium primogenitum marem legittimum et naturalem de legittimo matrimonio nasciturum ex dicta Domina Anna Maria, sorore dicti Domini Martini Antonij, si tunc extaret. Ita ut transeat de tali primogenito mare in primogenitum marem in omnibus et singulis gradibus descendentium legittimorum et naturalium ex legittimis matrimonijs ex ipsa Domina Anna Maria, et si talis filius non extaret ex dicta Domina Anna Maria, perveniant et pervenire debeant ad illum seu illos ad quorum favorem dictus Dominus Don Alexander disposuerit, et si non disposuerit ad proximiorem in gradu consanguinitatis ipsius D. Don Alexandri primogenitum."

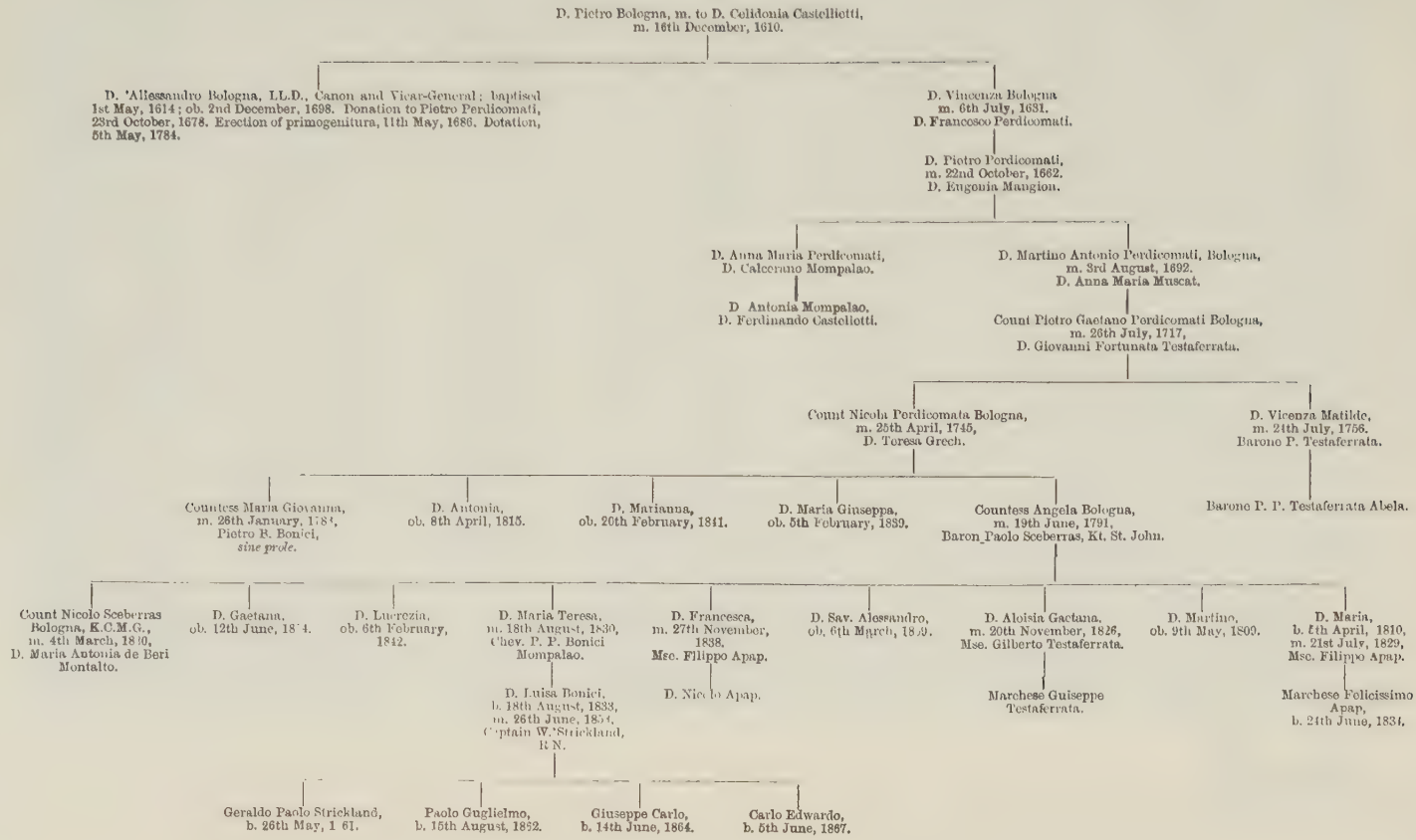
No other part of the deed was much relied upon by the counsel on either side, and in their Lordships' opinion the clauses above set out are alone material.

The Canon executed another deed in 1696, confirming the deed of 1686, and containing some further provisions, but neither has this been relied upon, and it will not be necessary further to refer to it.

The material facts to which the questions of law arising have to be applied are the following.

It is convenient here to insert the genealogical table, which is to be found in the record.

The Pedigree of the Bologna Family.


D. Pietro Bologna, m. to D. Celidonia Castelliotti, m. 16th December, 1610.
D. Alessandro Bologna, LL.D., Canon and Vicar-General; baptised 1st May, 1614; ob. 2nd December, 1698. Donation to Pietro Perdicomati, 23rd October, 1678. Erection of primogenitura, 11th May, 1686. Dotation, 5th May, 1784.
D. Vincenza Bologna m. 6th July, 1631. D. Francesco Perdicomati.
D. Pietro Perdicomati, m. 22nd October, 1662. D. Eugenia Maugion.
D. Anna Maria Perdicomati, D. Calcernno Mompalao.
D. Antonia Mompalao. D. Ferdinando Castelliotti.
D. Martino Antonio Perdicomati, Bologna, m. 3rd August, 1692. D. Anna Maria Muscat.
Count Pietro Gaetano Perdicomati Bologna, m. 26th July, 1717, D. Giovanni Fortunata Testaferrata.
Count Nicola Perdicomata Bologna, m. 25th April, 1745, D. Teresa Grech.
D. Vicenza Matilde, m. 24th July, 1756. Barone P. Testaferrata.
Barone P. P. Testaferrata Abela.
Countess Maria Giovanna, m. 26th January, 1784, Pietro B. Bonici, sine prole.
D. Antonia, ob. 8th April, 1815.
D. Marianna, ob. 20th February, 1841.
D. Maria Giuseppa, ob. 5th February, 1839.
Countess Angela Bologna, m. 19th June, 1791, Baron Paolo Sceberras, Kt. St. John.
Count Nicolo Sceberras Bologna, K.C.M.G., m. 4th March, 1840, D. Maria Antonia de Beri Montalto.
D. Gaetana, ob. 12th June, 1874.
D. Lucrezia, ob. 6th February, 1842.
D. Maria Teresa, m. 18th August, 1830, Chev. P. P. Bonici Mompalao.
D. Francesca, m. 27th November, 1838, Msc. Filippo Apap.
D. Sav. Alessandro, ob. 6th March, 1859.
D. Aloisia Gaetana, m. 20th November, 1826, Msc. Gilberto Testaferrata.
D. Martino, ob. 9th May, 1869.
D. Maria, b. 5th April, 1810, m. 21st July, 1829, Msc. Filippo Apap.
D. Luisa Bonici, b. 18th August, 1833, m. 26th June, 1854, Captain W. Strickland, R.N.
D. Nicolo Apap.
Marchese Guiseppe Testaferrata.
Marchese Felicissimo Apap, b. 24th June, 1834.
Geraldo Paolo Strickland, b. 26th May, 1861.
Paolo Guglielmo, b. 15th August, 1862.
Giuseppe Carlo, b. 14th June, 1864.
Carlo Edwardo, b. 5th June, 1867.

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From this table it appears that Martino Antonio had a son, Gaetano. That Gaetano had a son, who is called in the proceedings Nicola the elder, and a daughter, Matilda.

That Nicola had five daughters, and Matilda a son; that of Nicola's daughters, the eldest had a son who died without issue; that the second, third, and fourth died without issue; that the fifth, "Angela," had nine children, of whom Count Nicola Sceberras (called Nicola the younger) was the eldest; that the two next (daughters) died without issue; that the fourth (Theresa) had a daughter, Luisa, who became Mrs. Strickland, and is the mother of Geraldo, the plaintiff, who was born in 1861; the fifth, Francesca, had a son, Nicolo Apap, who must have been born after 1838; that the sixth, Alessandro, died without issue; that the seventh, Aloisia, had a son, the Marchese Testaferrata, who appears to have been born in 1838; that the eighth died without issue; and lastly, that Maria, the youngest, was the mother of the defendant, who was born in 1834.

Count Nicolo the younger succeeded to the estate on his birth, in pursuance of clause 3, the effect of which will be hereafter discussed; on his death in 1875 without issue the succession now in question opened.

The plaintiff claims as the male descendant in the nearest collateral line to Nicolo.

The defendant claims by priority of birth under the 3rd clause; he further denies that the plaintiff, who must recover by the strength of his own title, is a primogenitus mas within the meaning of the deed.

An event in the history of the family should be here narrated.

On the death of Count Nicolo the elder A.D. 1770, a dispute arose relating to the succession between Maria Giovanna, his eldest daughter, and the Barone Testaferrata Abela, the son of his sister.

On an action being brought by Giovanna against the Baroness Matilde Testaferrata, who defended in her own behalf and in that of her son, the parties agreed by a "compromissum" to submit their respective claims to the "Sacra Rota Romana," and to be bound by an unanimous judgment upheld on a re-hearing.

The cause was heard twice before Judge Origo, and he on each occasion decided in favour of Giovanna.

A third decision in her favour was given by Cardinal Herzan.

This decision was reversed by a fourth, given by the same Judge. Whereupon—probably to avoid the effect of res judicata—her four sisters joined Giovanna. In the result two further successive decisions were given by Herzan in favour of Testaferrata.

These three decisions were again reversed by Judge Riminaldo, and the first three decisions were rehabilitated, with this difference, that all five daughters were declared entitled to the succession. The decision of Riminaldo was twice reheard and twice reaffirmed. The litigation, which had extended over twelve years, was then stopped by the order of the Grand Master, and the five daughters of Nicolo seem to have held possession of the estate, until Nicolo the younger was born to Angela, the youngest, whereupon Nicolo succeeded to the possession.

These decisions cannot, of course, be relied upon by either party as constituting res judicata, neither the parties to the then suit nor the point decided being the same as in this. Yet reference may be advantageously made to some of the principles of law laid down by a tribunal of much learning and authority. The ratio decidendi of the judgment given in favour of the daughters of Nicolo the elder is that in this settlement superiority of line is preferred to all other considerations.

It now becomes necessary to examine the provisions of the deed of 1686, and it will be convenient in the first instance to ascertain the meaning of clause 1 if it had stood alone unaffected by any subsequent clauses.

It has been contended by the appellant either that the clause establishes a primogenitura completely regular, in which case Mrs. Strickland would take in preference to her son, or that it establishes an agnatial primogenitura, in which case of course she could not take nor could her son inasmuch as he claims through a female.

The preference of Geraldo to his mother is thus dealt with by the Second Hall:—

"Considering that in consequence of the enactment contained in the said code Rohan whereby the male sex is to be preferred to

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the female sex in default of a contrary rule, and in consequence of the dispositions of the said canon who called males when they existed from first born to first born in perpetuity, it is evident that the said Luisa had no vested right in the said 'primogenitura' in competition with the other plaintiff her son whatever her rights might have been if no males had existed."

It is to be observed that the Court do not decide nor is it necessary to decide whether if on the opening of the succession Mrs. Strickland had not had a son and the primogenitura had vested in her it would have been divested by the subsequent birth of Geraldo.

A primogenitura with an expressed preference for males seems to be a well-known form of settlement, and this preference is not regarded as such a deviation from regularity as to make the primogenitura irregular.

The present primogenitura is accordingly treated by the Rota Romana in six decisions and by the Court of Appeal in Malta as a regular primogenitura, with a qualification as it is termed in favour of males.

The effect of such a primogenitura is thus described by Origo in a judgment which was subsequently affirmed:—

"Masculorum vocatio nil aliud operatur quam eorum prælatione supra fœminas distributive in qualibet linea.

"Minus enim quam fieri potest recedendum est a juris ordine in primogenituris præscripto.

"Jus namque nullo modo patitur ut ob datam masculis prælationem tota invertatur primogenialis successio."

The effect of such a primogenitura is further illustrated by this passage from Torre, part 1, c. 25, s. 24, No. 268:—

"Nec repugnat quod mater sit exclusa, et non filius ex ea descendens, quia, quando non una est causa exclusionis in matre et filiis, non est inconveniens ut unus admittatur, excludatur altera, ut quando causa exclusionis consistit in qualitate sexus, quo casu excluditur mater quia non est masculus, non vero excluditur filius quia habet hanc prerogativam. Contrarium procedet in fideicommisso agnatitio, in quo, si excluditur mater quia non est

agnata, ita excluditur ejus filius quia non est conjunctus per virilem sexum."

In the 10th volume of the works of Cardinal de Luca, de Fideicommissis (Discursus II.), it is stated to have been held that in such a primogenitura the birth of a son operates to exclude the mother even if the estate had been actually vested in her. Their Lordships understand the Cardinal somewhat to question this decision, but he expresses no doubt that if the son be born upon the opening of the succession he will take in preference to his mother. But that this preference of males does not make the primogenitura "agnatial" appears from the passage which has been quoted from Torre, to which the following passage from Torre may be added (Book 1, c. 5, s. 98):—

"Inter descendentes vero ex lineâ qualitatis, prout dictum fuit, attenditur regula de quâ in primogenitură propriâ et regulari, ut primo et principaliter habeatur respectus in successione ad lineam, secundo gradum, tertio sexum, et demum ætatem. Et propterea in fideicommisso et Primogenitura favore agnationis condito, in quo verè admittuntur Agnati dumtaxat, per obitum Pauli prætendentibus succedere Ignatio et Simeone, de persona Ignatii utpote ex Teresa fœmina procreata, et sic qualitatem agnationis non possidente, nulla est habenda ratio, quamvis aliàs secundum lineam substantiæ admittendus esset, et præterea eâ exclusâ succedet Simeon. Non vero si ageretur de primogenitura favore masculorum condita; quia tunc, licet ex fœmina procreatus, admittendus esset tanquam in linea proximior, ut alibi dicemus."

Such is also the view of Cardinal de Luca.

In the case of the *Marquis Testaferrata* v. *Desani*, before a Maltese tribunal (printed in the Appendix), it was held that in such a primogenitura wherein there was even an express direction that the property should devolve in the masculine line and that females should be excluded, nevertheless the male descendant of a female in the better line took in preference to a male descendant of a male in an inferior line though earlier born. It is further to be observed that not one of the decisions of the Rota Romana affirm this primogenitura to be agnatial.

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In one of the judgments of Riminaldo this passage occurs:

"Appellatione filiorum et descendentium masculorum non ambigitur tam masculos ex masculis quam masculos ex fœminis venire."

And in the second decision of Herzan, which the defendant considers most favourable to himself inasmuch as the primogenitura was there held to be in some respects irregular, it is said:

"Intelligi namque ea necessario debent cum in eadem primogeniali lineâ in eodem columnello masculi existunt; quo certe casu primogenitura gradualis manet, neque opus est ad masculos alterius lineæ aut columnelli recurrere. Quin ubi etiam successio ad collaterales defertur, id non per *saltus* fit, sed ordine servato, ita ut prius succedat masculus ex *secundogenita*, quam masculus ex *tertiogenita*, prius *proximior*, quam *remotior* et sic de reliquis prærogativis. Hoc enim certum est in primogenituræ etiam irregulari, in quâ aliqua primum *qualitas* requisita sit et attendi debeat, post illam cæteras observari ordinarias regulas succedendi."

On these authorities, to which many others might be added, their Lordships are of opinion that although the primogenitura as created by sect. 1 was so far qualified in favour of males as in the events which happened to devolve on Geraldo in preference to his mother it was not an agnatial primogenitura so as to prevent females from constituting lines of descent; that it was no part of Canon Bologna's intention to displace the well-known rule of regular primogenitura, that "line" is to be considered in preference to degree, sex, or age; and therefore when the succession opened on the death of Nicolo the younger Geraldo was entitled to succeed being in a nearer collateral line, viz. that of the elder sister, than the Marchese Apap, who though born first was in the line of the younger sister.

It remains to be considered how far if at all the effect of clause 1 is altered or modified by the succeeding clauses.

Their Lordships concur with the Court of Appeal in Malta that clause 2 giving a power to any successor of Antonio to prefer a younger to an elder son (a power which has never been exercised) has no bearing on the construction of the rest of the deed.

It has been agreed that "filios" in the 3rd clause is to be read as "filias," for even if "filios" be printed correctly the context shews that it must be construed "children," and that such children must be female.

With respect to this clause the Court of Appeal observe:—

"In the aforesaid regular primogenitura females are not excluded *per modum regulæ*, but are on the contrary expressly called *in subsidium* in default of males and in the hereinbefore mentioned sense and only until a male would be begotten according to the said grant.

"The grantor in calling females *in subsidium* has not deviated from the rules of a proper and regular 'primogenitura,' but he has on the contrary observed the said rules."

From this passage their Lordships are disposed to infer that the Appeal Court were of opinion that, according to that clause, females would take in succession, and not collectively, and further, that the exclusion by an after-born male of a female in whom the succession had become vested would be in accordance with the ordinary rules of law applicable to such a primogenitura.

For the purposes of discussion, however, they will assume the appellants to be right in their contention that in the event contemplated by the clause the daughters will take collectively, and further, that the clause departs from the ordinary rule in directing that a son shall displace an estate actually vested in the possession of his mother.

The main arguments of the appellant based upon this clause are as follows:—

That, as the estate was vested in all the daughters collectively of Nicolo the elder, no one of them could form a line preferential to the line of all or any of the others, or could indeed form a line of descent at all; that the principle of line having been thus destroyed and excluded from the succession, the Marchese Apap takes by priority of birth. It was further argued that clause 3 takes effect, not only when females are actually in possession of the primogenitura, but when they are entitled to it in expectancy, that during the life of Nicolo the younger, his sisters, on the death of their brothers without issue, were entitled to the estate

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in expectancy (it being assumed that the clause applies to collaterals), and that upon the birth of Apap, the estate vested in expectancy in him, subject only to be defeated by the birth of issue to Nicolo, and that the estate thus vested in expectancy could not be defeated by the subsequent birth of Geraldo. And to the objection that clause 3 cannot apply to this present case at all, because there has been no moment of time at which a "primogenitus mas" could not be found, the appellant answers that clause 4 applies to clause 3 and to it only, and must be taken to make the provisions of clause 3 operate even in cases when there is a male ready to take the succession on its opening.

Their Lordships are unable to accede to these arguments.

By a well known rule a deviation from the ordinary mode in which a primogenitura descends is not to be construed as interfering with that mode of descent more than is necessary to give effect to such deviation.

Assuming that in the event contemplated by the section females are to take collectively, it by no means follows that all or any of them are prevented from forming lines of descent.

Their Lordships are further of opinion that the provisions of clause 3 apply only to the case therein stated, viz., when, upon the opening of the succession, there is no "primogenitus mas," in which case the estate devolves on females who are to be displaced by the first male born from any of them. They conceive that the intention of clause 4 is perfectly clear. Up to this part of the deed the settlor has provided for, or called, Martino Antonio and his descendants in a certain order, providing for the event of the existence of males, and also for the event of their non-existence. He now expresses his intention that the provisions he has made in both classes of events shall extend to all generations. Clause 4 is not designed to extend the range of clause 3 to events not contemplated by the introductory words of that clause, but to ensure that all the preceding provisions shall be as applicable to future generations as to Martino Antonio and his children.

If Nicolo had died without issue, leaving sisters only, neither of whom had a son, the estate would (again assuming that the clause applied to collaterals) have devolved upon the sisters, to be

divested on the birth of the first male to either of them. But this event has not happened. On the death of Nicolo there was no defect of a "primogenitus mas," inasmuch, as for the reasons before given, Geraldo fulfilled this condition. Their Lordships are therefore of opinion that in the events which have happened clause 3 had no operation after Nicolo the younger had succeeded, and that Geraldo was entitled to the estate by virtue of the ordinary rules of law applicable to the primogenitura established by clause 1.

In this view it becomes unnecessary to deal with a further argument that the appellant was entitled under the ultimate remainder to the nearest in consanguinity to the donor, inasmuch as the previous dispositions have not failed.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be affirmed, and the appeal be dismissed, with costs.

Solicitors for appellant: *Gregory, Rowcliffes, Rawle, & Johnstone.*

Solicitors for respondents: *Ward, Mills, Witham, & Lambert.*

[PRIVY COUNCIL.]

J. C.* 1882 Jan. 24.

VERNON ALLEN . . . . . PLAINTIFF;

AND

MEERA PULLAY, SHEIK IBRAHIM AND ANOTHER . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS, DIVISION OF PENANG.

Straits Settlement—Ordinance 8 *of* 1873, *sect.* 12, *sub-sect.* 2 *and sect.* 26—*Insufficient Cancellation—Additional Stamp—Admissibility in Evidence.*

Sect. 26 of Ordinance 8 of 1873, applies to all cases where a document has not been duly stamped, and for which a special provision in the ordinance has not been previously made, as in the case of bills of exchange and other documents.

Where an agreement, liable to stamp duty under Schedule A, had not been cancelled in manner provided by sect. 12, sub-sect. 2 (the date of cancellation only, and not the initials appearing thereon):—

Held, that it could be and was rendered admissible in evidence by means of an additional stamp under sect. 26.

APPEAL from the Supreme Court (Feb. 14, 1879), reversing the decision of Mr. Justice Wood, which was in favour of the Appellant. The Supreme Court concurred with the Court below upon all points except the admissibility in evidence of the agreement, for breach of which the suit was brought.

The circumstances of the case appear in the judgment of their Lordships.

Mayne, for the appellant.

A. Charles, Q.C., and *H. R. Mansel Jones*, for the respondents.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit which is the subject of the present appeal is brought upon an agreement made between the plaintiff and the defen-

* *Present*:—LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

dants, by which it was agreed that if the plaintiff should obtain the contract for supplying the Dutch at Acheen, through Messrs. Katz Brothers of Penang, he was to hand over the contract to the defendants, and that the defendants were to pay to the plaintiff a commission on all payments for supplies at the rate of 2½ per cent.; and should the defendants or any one of them get the contract, then they were to pay to the plaintiff 2½ per cent. commission on all payments for supplies; and further that if the defendants or any one of the parties to the agreement should supply anything for the Dutch at Acheen, they agreed to pay to the plaintiff a commission of 2½ per cent. The plaintiff's case was that the defendants became the sub-contractors for the supply of cattle to Messrs. Katz for the Netherlands India Government at Acheen, and he claimed payment of the sum of $8,420 for commission.

The defendants, in the first instance, demurred to the declaration, which demurrer was overruled, and they were allowed to plead; and having pleaded pleas which went to the merits of the case and denied the right of the plaintiff to recover, but which are not material to be considered in this appeal, the case came on for trial before one of the judges of the Supreme Court of the Straits Settlements, Division of Penang. At the trial the agreement was tendered in evidence; and it appeared upon the face of it to bear a stamp of 50 cents, with a cancellation only by the figures "10/8/75."

Now the Ordinance 8 of 1873, in force in the Straits Settlements, provides by sect. 12 that, "No instrument liable to stamp duty under schedule A,"—which schedule included an agreement of this description,—"shall be deemed duly stamped unless the official stamp be of not less than the proper amount of duty required by this ordinance, and unless such stamp shall have been cancelled in the manner required by this ordinance;" which manner is stated in the 2nd sub-section to be "by the person who shall first execute the instrument, or issue or deliver it out of his hands, custody, or power, writing or marking in ink on or across the same his name or initials, or the name or initials of his firm or principal, together with the date of his so writing or marking, so that every stamp shall be effectually cancelled and rendered incapable of being used for any other instrument." The

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omission was that, although the date of the cancellation appeared on the stamp, the initials had not been written.

The learned judge adjourned the trial, and appears to have suggested that the parties might, if they thought fit, take some steps to remedy the defect under sect. 26 of the ordinance; and accordingly, on the next day, the trial being resumed, the agreement was produced bearing upon the face of it a stamp of five dollars with the date "27/9/77," the word "penalty," and signed "S. Jones," he being the collector.

Here it will be convenient to refer to the provisions of the ordinance which were made use of in getting this additional stamp affixed. Sect. 25, by reason of which the document was in the first instance refused to be received in evidence, provides, "Except as otherwise provided by this ordinance, no instrument for which any duty shall be payable under this ordinance shall be received as creating, transferring, or extinguishing any right or obligation, or as evidence in any civil proceeding in any Court of justice in the colony, or shall be acted upon in any such Court or by any public officer, or shall be registered in any public office or authenticated by any public officer, unless such instrument shall be duly stamped," with a proviso that it may be admitted in evidence in a criminal proceeding, although it may not have the stamp required by the ordinance. Then sect. 26 says, "If any instrument required by law to be stamped shall have been signed or executed by any person without its being duly stamped, and special provision to meet such case is not made in this ordinance, the collector of stamps, if satisfied that there was no intention to evade payment of the proper stamp duty, may direct such instrument to be properly stamped as follows:—If the instrument be produced to the collector within one week from the time of its execution, it may be properly stamped on payment of a fine of five dollars, or double the amount of proper stamp duty if that amount does not exceed five dollars. If produced after one week but within three months, a fine of twenty dollars, or four times the amount of proper stamp duty if that amount does not exceed twenty dollars. If produced after three months, a fine of fifty dollars, or ten times the amount of proper stamp duty if that amount does not exceed fifty dollars." It was under the last

clause that the stamp of five dollars in this case was affixed. Upon the agreement being so produced before the learned Judge he held that it was admissible in evidence; and finding against the defendants upon the questions raised by the pleas, he gave judgment for the plaintiff. From that judgment there was an appeal to the Supreme Court under a provision in the ordinances which gives an appeal on a matter of law; and the majority of the learned judges of that Court, there being two besides the judge who originally tried the case, held that the agreement was still not admissible in evidence and reversed the judgment for the plaintiff, and directed a judgment to be entered for the defendants. From that judgment the present appeal is brought.

The sole question is, whether this was not a case to which sect. 26 of the ordinance applied, and whether the agreement was not, by reason of the stamp having been affixed by the collector under that section, properly admitted in evidence. That section is, in its terms, apparently intended to apply to all cases where the document has not been duly stamped, and for which a special provision has not been previously made, there being special provisions in the ordinance for bills of exchange and other documents; and the words "without being duly stamped" would include not only cases where there was no stamp at all, or where the stamp was an insufficient one, but where, by inadvertence or accident, the stamp had not been properly cancelled. There might be many cases in which, from some mistake, there would not be a cancellation strictly within the terms of the section, and where it would be more reasonable to give the parties an opportunity of remedying the defect in the stamp than even in cases where something had been done deliberately. Then, the words "not being duly stamped" being intended apparently to include all those cases, the section goes on to say that the collector, if satisfied that there was no intention to evade payment of the proper stamp duty, may direct such instrument to be properly stamped. If the word "properly" is to be read, as it may fairly be, as meaning, not a stamp of the proper amount but properly stamped in all respects, not only of the proper amount but properly cancelled, and stamped in such a way as to make it admissible in evidence, then what may be reasonably considered to be

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the intention of the ordinance, namely, that provision should be made for rendering documents which, through some cause or other, had not been properly stamped, admissible in evidence would be carried out. On the other hand, if the word "properly" is to have a limited meaning, and is not to be read as being duly stamped, the effect would be this: that an opportunity is given to parties to go to the collector and to pay the penalty, get the document stamped, and then, when they have got it stamped, if the defect was want of cancellation, it still could not be used in evidence; but if the defect was the want of a stamp, it might perhaps be used. The object of this clause in the ordinance, coming as it does immediately after the 25th section, appears to their Lordships to be to provide for cases which it would be most reasonable to provide for, namely, that persons should not lose the power of suing upon an agreement or a document because there had been some omission with reference to the stamping of it; that if the penalty was paid, they could then make use of the document to enforce their rights. This would further appear to have been the intention from what is done by sect. 30, because the legislature appears to have provided in cases of this kind two modes of remedying the defect. The parties may go to the collector, and on paying the penalty they may get a document stamped in such a way that it can be made use of; but if they omit to do that, if the defect is not discovered, as it may sometimes not be, until the document is actually produced in Court, then it is provided that the Court may receive in evidence an instrument not bearing the stamp prescribed by the schedule, on payment of the proper amount of stamp duty to be determined by the Court. The Court may do what the collector might do, and it is observable here that the Court is empowered to receive the document in evidence upon payment of the amount of stamp duty, but it is not necessary before it is received in evidence that the stamp should be cancelled. There is a direction afterwards that the officer of the Court shall cancel it; but it is not a condition precedent to its being received in evidence. It would be properly received, and the omission afterwards to cancel it would not make it less receivable: it would have already been received. In the case of its being produced in Court and the penalty being paid it is to be received

in evidence without the formal cancellation which it is said ought to have been made under sect. 26, and which could not be made. Why should there be any difference between the remedy given to the party in the one case and in the other? The whole scope of the provision appears to be this: that under sect. 25, the document being declared not to be receivable in evidence unless it is duly stamped, the legislature says, Now that being the state of things, a remedy shall be provided; and if the party pays the penalty which is prescribed and the stamp is affixed, then the document may be made use of. The construction which was put upon the ordinance by the learned judges of the lower Court, instead of being a reasonable and natural construction of its provisions, is in reality a forced one; and some of their observations appear almost to shew that they felt that to some extent it was a forced construction.

Their Lordships therefore are of opinion that the document was properly received in evidence by the learned judge, and they will humbly advise Her Majesty that the judgment of the Court on the appeal be reversed, and that the judgment of the first judge do stand. The respondents will pay the costs of the appeal, and the appellant will receive back his deposit.

Solicitors for appellant: *Talbot & Tasker.*
Solicitors for respondents: *Walker, Martineau & Co.*

[PRIVY COUNCIL.]

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THE WESTERN COUNTIES RAILWAY COMPANY . . . . . } DEFENDANT;

AND

THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY . . . . . } PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

British North America Act, 1867, s. 108—*Power of Canadian Legislature—Construction of Dominion Act*, 37 *Vict. c.* 16.

Under the British North America Act, 1867, s. 108, read in connection with the 3rd schedule thereto, all railways belonging to the province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st of July, 1867, in the Dominion of Canada; but not for any larger interest therein than at that date belonged to the province.

The railway in suit being at the date of the statutory transfer subject to an obligation on the part of the provincial Government, confirmed by provincial Act, 30 Vict. c. 36, to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation entered into a further agreement relating thereto of the 22nd of September, 1871.

Quære, whether it was ultrà vires the Dominion Parliament by an enactment to that effect to extinguish the rights of the respondent company under the said agreement.

But *held*, that Dominion Act 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondent's rights under the agreement of the 22nd of September, 1871, or otherwise.

APPEAL from a decree of the Supreme Court (April 5, 1881), affirming a judgment of the Judge in Equity of that Court (March 1, 1880).

The facts are stated in the judgment of their Lordships.

The object of the suit was to obtain a declaration of the respondent's title to a railway in Nova Scotia, called the "Windsor

* *Present*:—LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

Branch," and to recover possession of the same, and for an injunction to restrain the appellants from keeping possession thereof, and running trains thereon, and for an account of their receipts from freight and passengers thereon since it came into their possession.

The main contention of the appellants was that the effect of the Canadian Act (37 Vict. c. 16) had been to deprive the respondents of their rights in respect of the Windsor Branch. The Respondents denied that such was the effect of the statute. The Courts below gave effect to this contention. The Equity Judge (Ritchie, J.) held that the true interpretation of the Act was that it only vested the Windsor Branch in the appellants so far as the Government were entitled to deal with it, and subject to the respondent's rights. The Supreme Court (Young, C.J., Ritchie, Desbarres, and Smith, JJ., James, J., dissenting), without dissenting from the construction put upon the Act by the Equity Judge, held that it was unnecessary to consider it, on the ground that if the Act upon its true construction did deprive the respondents of their rights derived under their Act of incorporation and the agreement of 1871, it was a statute dealing with property and civil rights within the province of Nova Scotia, one of the subjects specially reserved by the British North America Act, 1867, to the provincial legislature, and was therefore ultrà vires and void. Mr. Justice James, on the other hand, held that (1) the Act of 1867 vested the Windsor Branch in the Dominion Government free from any engagements contracted with respect to it by the provincial Government; (2), that the Dominion Legislature was entitled to pass any Act relating to it, and that upon the true interpretation of 37 Vict. c. 16, it vested the Windsor Branch absolutely in the appellants and deprived the plaintiffs of all right to it.

Benjamin, Q.C., and *Gathorne Hardy*, for the appellant company, contended that the judgment of the majority was wrong, and that the respondents had no title to the railway in suit. By the British North America Act, 1867, sect. 108, the railway in suit was made part of the public property of Canada absolutely. The Dominion Government thereupon had full control over it and the Dominion

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Parliament absolute legislative jurisdiction in respect to it. By virtue of the Act of 1867 the Dominion Parliament succeeded to the full legislative authority previously possessed in regard to this railway by the provincial parliament of Nova Scotia. The agreement, however, of the 22nd of September, 1871, purported to be made in pursuance of the provincial Act 30 Vict. c. 36, by which the railway continued to be governed after the statutory transfer. It was however ultrà vires the powers conferred by that Act, which did not authorize the executive to enter into an agreement giving the respondents the exclusive use of the Windsor Branch and the right to collect all the tolls thereon. That Act was passed in the interval between the 29th of March, 1867, when the British North America Act was passed, and the 1st of July, the date on which it came into force. So also the agreement of the 22nd of June, 1875, was ultrà vires the executive, so far as it purported to revive or confirm the agreement of 1871, and was contrary to the Dominion Act 37 Vict. c. 16. The effect of that Act, and the action of the Government thereon, and the delivery by the Government and the acceptance by the appellants of the possession of the railway in suit was to vest in the appellants the exclusive right to the possession of the said railway as their absolute property, notwithstanding the agreements of 1871 and 1875. It purported to extinguish the rights of the respondents in the railway, and was operative for that purpose, being intra vires the Dominion Parliament.

Horace Davey, Q.C., and *Bompas*, Q.C. (*Beaumont* with them), for the respondent company, contended that their title to the railway in suit had not been affected by what had passed. The agreement of 1871 was intra vires the executive and carried out the provisions of their Act of incorporation, 30 Vict. c. 36. Under that agreement and its subsequent confirmation in 1875 the respondents were entitled as claimed.

With regard to the Dominion Act, 37 Vict. c. 16, relied upon by the other side, it did not upon its true construction purport to extinguish the rights of the respondents. It did not confer any rights on the appellants, and did not enact any transfer in derogation of the respondent's rights. It merely authorized a transfer

which had not been carried into effect. It could not be construed in the way contended for by the appellants unless the intention appeared from express words or necessary implication. Reference was made to *Ward* v. *Scott* (1); *Barrington's Case* (2); *Prior of Castleacre*, referred to in *Barrington's Case* (3); *Chalk* v. *Peter* (4); *Dawson* v. *Paver* (5); *Hammersmith and City Railway Company* v. *Brand* (6); *Managers of the Metropolitan Asylum District* v *Hill* (7).

Further, the Canadian Acts, which are in the nature of private Acts, are not to affect railways unless specially mentioned: see 31 Vict. c. 1, s. 7, sub-ss. 33, 34.

Then as regards the competence of the Dominion Parliament to pass 37 Vict. c. 16, reference was made to British North America Act, 1867, s. 92, sub-s. 10, which reserves to the provincial Legislature the local jurisdiction. But, assuming that the Dominion Legislature has absolute power to legislate over public property (that is the interest of the Government or the public in the *res*), there was no power to extinguish private rights therein, such for instance as the rights of the respondents under their Act of incorporation and the agreement of 1871: see also sub-s. 11. The Dominion Parliament cannot repeal the provincial Act, 30 Vict. c. 36, and thereby affect the terms of the respondents' incorporation. In s. 94 the Imperial Parliament contemplates double legislation on certain subjects and provides for it. Reference was made to *L'Union de St. Jacques de Montréal* v. *Belisle* (8); *Dow* v. *Black* (9); *Citizens Insurance Co.* v. *Parsons* (10).

Benjamin, Q.C., replied.

The judgment of their Lordships was delivered by

LORD WATSON:—

In the present case each of the contending parties claims the exclusive right to possess and work the Windsor Branch Railway

(1) 3 Camp. 284.
(2) 8 Rep. 137 b.
(3) 8 Rep. 138 b.
(4) Ibid. 136 b.
(5) 5 Hare, 415, 438.
(6) Law Rep. 4 H. L. 171.
(7) 6 App. Cas. 193.
(8) Law Rep. 6 P. C. 36.
(9) Ibid. 272.
(10) *Ante*, p. 96.

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in the province of Nova Scotia. This line was originally constructed as one of the public railways of the province, and was intended to be part of a general system connecting Halifax and other towns of importance with the frontier of the province of New Brunswick. After the passing of the British North America Act, 1867, and in accordance with its provisions, all railways belonging to the province of Nova Scotia, including the line in question, passed to and became vested in the Dominion of Canada.

The Chief Commissioner of Railways for Nova Scotia, acting under authority conferred upon him by the provincial Act, 28 Vict. c. 23, entered in November 1866, into an agreement with Messrs. Punchard, Barry, and Clark, of London, whereby those gentlemen became bound to make a railway, which was to be their own property, from Windsor, one of the termini of the branch in question, to Annapolis. By that agreement it was inter alia provided that before the new line from Windsor to Annapolis was opened by Messrs. Punchard, Barry, and Clark, a traffic arrangement was to be made between them and the provincial Government "for the mutual use and enjoyment of their respective lines of railway between Halifax and Windsor, and Windsor and Annapolis, including running powers, or for the joint operation thereof, on equitable terms to be settled by two arbitrators, to be chosen by the parties in case of difference."

By an Act of the Legislature of Nova Scotia, passed upon the 7th of May, 1867 (30 Vict. c. 36), Messrs. Punchard, Barry, and Clark were constituted a body corporate, by the name of the Windsor and Annapolis Railway Company; and the agreement of November, 1866, between them and the Chief Commissioner of Railways was, by the same Act, adopted and confirmed.

The Windsor Branch Railway became the property of the Dominion upon the 1st of July, 1867, being the day appointed by Her Majesty, in terms of s. 4 of the British North America Act, for the provisions of that Act coming into operation. And on the 22nd of September, 1871, the Government of Canada, as then owners of the railway, and in implement of the obligation to make a "traffic arrangement" which is contained in the agreement of November, 1866, entered into a new agreement with the respondents, the Windsor and Annapolis Railway Company.

It is unnecessary to consider in detail the whole terms of the agreement of 1871. Its provisions, so far as bearing upon the present case, are in substance these. The exclusive use and possession of the Windsor Branch Railway were made over to the respondent company, with running powers over the trunk line, also belonging to the Dominion Government, which connects the Windsor Branch with Halifax. The Dominion Government was to maintain the Windsor Branch as well as the trunk line in workable condition, whilst the respondent company undertook to render and adjust regular monthly accounts of all traffic carried by them over these lines, and to pay to the Government, not later than twenty-one days from the end of each month, one third of their gross earnings from such traffic. The company also undertook to provide rolling stock, and to run a certain number of trains daily, with stated hours of departure and arrival, and to conduct their business and traffic with impartiality and fairness. No right of re-entry was reserved in case of the company's failure punctually to make payment of one third of their earnings, but it was stipulated (Art. 19) that "in the event of the company failing to operate the railways between Halifax and Annapolis, then this agreement shall terminate, and the authorities may immediately proceed to operate the railway between Halifax and Windsor as they may deem proper and expedient." Last of all, it was provided that the agreement should take effect upon the 1st day of January, 1872, and continue for twenty-one years, and be then renewed on the same conditions, or upon such other conditions as might be mutually agreed on.

In accordance with the foregoing agreement, the respondent company in January, 1872, took possession of and worked the Windsor Branch line. Shortly afterwards the monthly payments due to Government fell into arrear, but these arrears were paid in full in November, 1872, in consequence of a threat that Government would resume possession of the railway. During the following year the company again failed to make payment of the third of the traffic receipts for which they were liable to the Dominion Government, who intimated that, unless all arrears were paid up on or before the 1st of October, 1873, they would resume possession.

On the 22nd day of October, 1873, an order of the Privy

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Council of Canada was passed, approving of a report, dated the 21st of the same month, from the Minister of Public Works, "stating that the Windsor and Annapolis Railway Company had failed to operate the railway known as the Windsor Branch, mentioned in Order in Council of the 22nd of September, 1871, and to comply with the other terms and conditions of that Order in Council, and now owe $30,000 to the Government of Canada, and though repeatedly called upon to pay have failed to do so, and recommending that, inasmuch as the said company have failed to operate one of the railways between Halifax and Annapolis, the Government of Canada, known as 'the authorities' by the said Order in Council, do proceed immediately to operate the railway between Halifax and Windsor."

On the same day (the 22nd of October, 1873) the Governor General in Council, subject to the sanction of parliament, approved of a proposal made by the appellant company for a transfer to them of the Windsor Branch Railway, upon these conditions:—

"1st. The said company will undertake to receive the said railway and appurtenances on the 1st day of December, Anno Domini 1873, and from that date to work it efficiently and keep the same in repair at their own proper costs and charges, collecting, receiving, and appropriating to their own use all the tolls and earnings of the same.

"2nd. That on the completion of the Western Counties Railway from Yarmouth to Annapolis (now in course of construction), the said railway and appurtenances, from Windsor to the trunk line, shall be and become absolutely the property of the said Western Counties Railway Company.

"3rd. That, in consideration of the premises, the said company hereby engage to prosecute the work of building the railway from Yarmouth to Annapolis, and to complete the same with all reasonable despatch."

On the 30th of October, 1873, the Governor General in Council approved, subject as before to parliamentary sanction, of a further proposal made by the appellant company in these terms:—

"1st. That the Western Counties Railway Company shall carry, free of charge, all passengers holding government tickets, on all their passenger trains running between Halifax and Windsor Junction.

"2nd. That the said company, or their agents or assigns, shall have running powers over the Intercolonial Railway, between Halifax and Windsor Junction, with such privileges as have been hitherto granted in the agreement with the Windsor and Annapolis Railway."

On the 26th of May, 1874, an Act was passed by the Parliament of Canada (37 Vict. c. 16), entitled, "An Act to authorize the transfer of the Windsor Branch of the Nova Scotia Railway to the Western Counties Railway Company." The proposals of the appellant company, which were provisionally agreed to by the Orders in Council of the 22nd and 30th of October, 1873, respectively, were set forth at length in Schedules A and B appended to the Act, and are referred to and sanctioned by the enacting clauses. It will be necessary, hereafter, to examine this statute more closely, because the appellant's case is mainly founded upon its provisions, and the parties are widely at variance as to their true import and effect.

Upon the 22nd of June, 1875, the respondent company entered into an agreement with the Minister of Public Works of Canada, by which the company, on the one hand, undertook to alter the gauge of the Windsor and Annapolis Railway from 5 ft. 6 in. to the standard gauge of 4 ft. 8½ in., to deliver to the minister a certain quantity of locomotives and other broad gauge plant, and to release all claims and demands against the Government of Canada up to 1st day of July, 1875. On the other hand it was agreed that, upon the change of gauge being effected, all arrears of traffic receipts, due by the company to the Government, which had accrued up to the 1st of January, 1875, should be discharged, and that the Minister of Public Works should then deliver to the company a like quantity of narrow gauge engines and rolling stock. It was further stipulated that the company should, on or before the 31st of July, 1875, make payment of the third of gross earnings which had accrued after the 1st of January, 1875, and that the proportion of such traffic earnings due to the Government,

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and thereafter accruing, should "be paid monthly, as provided in the said agreement under which the company hold and work the branch as aforesaid, which (except as aforesaid) is hereby declared in all respects in full force and effect." In pursuance of this agreement the respondent company altered the gauge of their line, and regularly made the payments therein stipulated, and an exchange of engines and rolling stock was also made in terms thereof.

The respondent company remained in full possession of the Windsor Branch line, and continued to work the same from the beginning of the year 1872 until the 1st of August, 1877. On that date the Dominion Government took possession of the Windsor Branch line; and on the 24th of September following transferred the possession of it to the appellant company under the agreement scheduled to the Canadian Act of the 26th of May, 1874.

The respondent company, upon the 10th of October, 1877, filed a bill in the Supreme Court of Nova Scotia against the appellant company, wherein it was prayed, inter alia, that the latter company should be ordered to deliver up possession to them of the Windsor Branch Railway. The appellant company appeared and demurred to the bill, but their demurrer was, on the 11th of March, 1878, overruled by the Judge in Equity, and an appeal taken against that judgment was dismissed by the Supreme Court sitting in Banco, upon the 29th of August, 1878, James, J., alone dissenting. The cause then returned to the Judge in Equity, and after the appellant company had put in their answer, and evidence had been adduced by both parties, Mr. Justice Ritchie, upon the 1st of March, 1880, gave judgment in favour of the respondent company with costs; and his judgment was affirmed with costs by the Supreme Court of Nova Scotia, on the 6th of April, 1881, James, J., being again the only dissentient judge.

Some of the points, unsuccessfully maintained by the appellant company in the Courts of Nova Scotia, were not pressed in the argument addressed to this Board. The two propositions seriously maintained by the appellants were these: (1.) That the Act passed by the Parliament of Canada upon the 26th of May, 1874 (37 Vict. c. 16), extinguished all right and interest which the respon-

dent company had in the Windsor Branch Railway, by virtue of the agreement of the 22nd of September, 1871, and transferred to the appellant company a present right to the exclusive possession, and a future right to the exclusive property of the said railway; and (2.) That the Parliament of Canada had, under the provisions of the British North America Act, 1867, ample legislative authority to take away, without compensation, any right in or relating to the railway which might be vested in the respondent company, and to transfer it to the appellants. It is not disputed that if either of these propositions be not well founded the appellants' case must fail.

The 108th section of the British North America Act, 1867, which must be read in connection with the third schedule of the Act, had the effect of transferring, upon the 1st of July, 1867, to the Dominion of Canada all railways which were the property of the province of Nova Scotia. Their Lordships are of opinion that it had not the effect of vesting in Canada any other or larger interest in these railways than that which belonged to the province at the time of the statutory transfer. Accordingly, the Dominion took the property of the Windsor Branch Railway subject to the same obligation by which the right of the provincial Government was affected, viz., to enter into a traffic arrangement with the respondent company in terms of the agreement confirmed by the provincial Statute of the 7th of May, 1867; and it was in pursuance of that obligation that the Dominion Government entered into the agreement of the 22nd of September, 1871. The agreement thus made was valid, and must continue to receive effect until it has been terminated by the default of the respondent company, by the mutual consent of parties, or by the action of a competent Legislature.

As already stated, the appellant company maintains that the agreement in question has been put an end to by the Act of a competent Legislature. In dealing with that contention it will be convenient to consider, in the first place, whether on the assumption that the Dominion Parliament had authority to enact the 37 Vict. c. 16, the provisions of that Act do extinguish those rights in relation to the Windsor branch which are conferred upon the respondent company by the agreement of 1871.

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The proposals, or provisional agreements, which are scheduled to the Act 37 Vict. c. 16, contain two distinct stipulations, the one relating to the possession and use, and the other to the property of the Windsor Branch Railway. By the first, the appellant company "undertake to receive the said railway and appurtenances on the first day of December, Anno Domini eighteen hundred and seventy-three," and to work it efficiently thereafter. Although the company undertake to receive, there is no corresponding obligation laid upon the Government to give them possession of the railway, either upon the 1st of December, 1873, or at any other specified date. By the second of these stipulations it is provided that, upon the completion of the Western Counties Railway, then in course of construction, from Yarmouth to Annapolis, the Windsor Branch Railway and its appurtenances shall be and become the absolute property of the appellant company. The Governor-General, with advice of his council, would probably have been entitled, by virtue of the administrative powers conferred upon him by the 12th section of the "British North America Act, 1867," to make a valid agreement in regard to the possession and working of the line; but it is, at least, very doubtful whether he would have had the right to alienate the property of the line, without the sanction of the Dominion Parliament. Be that as it may, the Parliament did interpose upon the 26th of May, 1874, to the effect, the appellants say, of destroying the previously subsisting agreement between the government and the respondent company.

Neither in the Act 37 Vict. c. 16, nor in the schedules appended to it, is mention made of the agreement of the 22nd of September, 1871, or indeed of any right or interest of the respondent company in the Windsor Branch Railway. The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words, or by plain implication, that it was the intention of the Legislature to do so. That principle was affirmed in *Barrington's Case* (1), and was recognised in the recent case of *The River Wear Commissioners* v. *Adamson* (2). The enunciation of the principle is, no doubt, much easier than its

(1) 8 Rep. 138 a. (2) 2 App. Cas. 743.

application. Thus far, however, the law appears to be plain—that in order to take away the right it is not sufficient to shew that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shewn that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights.

It appears to their Lordships that there is nothing in the provisions of the Dominion Act, 37 Vict. c. 16, to warrant the interence that the Parliament of Canada must have intended thereby to enact that immediate possession of the Windsor Branch, for the purpose of working it, was to be given to the appellant company under the agreements scheduled, even though there should be a subsisting arrangement for the working of the line. Indeed the contrary appears from the 2nd section of the Act, to which reference will be made hereafter.

The preamble of the Act recites the proposed transfer of the railway to the appellant company, and also a resolution of the Canadian House of Commons, of date the 23rd of May, 1873, to the effect that the Government should be authorized to enter into negotiations for the transfer of the Windsor branch to some reliable association or company, "upon condition that such company extend the railway from Annapolis to Yarmouth." It makes no reference to any right belonging to or asserted by the respondent company, nor does it refer to that part of the scheduled agreement which relates to the willingness of the appellant company to undertake to receive the railway and appurtenances upon the 1st of December, 1873. It is impossible, therefore, to gather from the terms of the preamble an intention to terminate at once any temporary right of possession which might belong to the respondent company. The transfer of the railway was obviously not expected to take place at once. It was dependent upon a condition which might never be fulfilled, and which admittedly has not yet been fulfilled, viz, the completion of the line from Yarmouth to Annapolis by the appellant company. Besides, the transfer of the property of the railway is nowise inconsistent with the fact of working arrangements affecting the transferor's right continuing to affect the right of the transferee.

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Then comes the leading enactment of the statute, as contained in s. 1, which is in these terms :—"The agreements hereinbefore referred to, and set forth in the schedules A and B to this Act, being such as were adopted by the orders of the Governor in Council of the 22nd and 30th days of October, 1873, and all the matters and things therein contained, are hereby approved and declared to be as effectual to all intents and purposes as if the said agreements had been entered into in pursuance of sufficient authority in that behalf given before the adoption of such agreements by Act of the Parliament of Canada."

It was argued for the appellants that the effect of the preceding clause is precisely the same as if the Parliament of Canada had, prior to October, 1873, passed an Act authorizing the Governor in Council to make an agreement with the appellant company in terms of the proposals set forth in schedules A and B. That argument appears to be well founded ; but what would have been the effect of such antecedent statutory authority ? Their Lordships are unable to discover any term in the contract contained in Schedules A and B binding the Government to give the respondent company immediate possession of the line, or to transfer the property of the line, free of all contracts or arrangements whatsoever ; and if such an obligation cannot be inferred from the language of the agreements sanctioned by the Legislature, it is impossible to derive from the language of this section any intention to defeat the respondent company's right of possession.

It appears to their Lordships that even if the terms of these proposals had contemplated the immediate transfer of possession to the appellant company, that would not have been necessarily conclusive against the respondents in this appeal. There is a great difference between giving authority to make an agreement and authorizing it to be made and forthwith carried out so as to override and destroy all private rights that may stand in its way.

The 2nd, and only other section of the Act, provides that until arrangements are completed for giving possession of the line to the appellant company for the purpose of working it until the completion of their line from Annapolis to Yarmouth, the Government shall have power to make such other arrangements as may

be necessary, "by continuing the working of the same by the Windsor and Annapolis Railway Company, or otherwise." These provisions certainly do not suggest that it was in the contemplation of Parliament that immediate possession of the Windsor Branch Railway was to be given to the appellant company for the purpose of operating it; on the contrary, they are apparently intended to meet the case of the Government declining to give possession of the line to the appellant company at the time when the latter had undertaken to receive it. Nor do these provisions necessarily indicate that, if there should be a subsisting working agreement with the respondent company, or any other company, that agreement was to be set aside in order to admit of the Government making such an arrangement as is provided for in this section. In case of there being no such standing agreement in the way, the powers conferred upon the Government are very wide; and even if the agreement of 1871 had been determined, it is by no means clear that the agreement of the 22nd of June, 1875, would not give the respondent company right to continue their possession of the line.

In the view which their Lordships take of the import and effect of the Canadian Act, 37 Vict. c. 16, it becomes unnecessary to decide whether, if it had chosen to do so, the Parliament of Canada would have had the power to extinguish the rights of the respondent company under the agreement of the 22nd of September, 1871. Whether that power is given by the provisions of the "British North America Act" to the Dominion Parliament, or to the Legislature of Nova Scotia, is a question of difficulty and importance; but seeing that it does not arise for decision in the present case, their Lordships express no opinion whatever in regard to it.

Their Lordships will, therefore, humbly advise Her Majesty that the judgments of the Courts below ought to be affirmed, and the appeal dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellant: *Markby, Stewart, & Co.*
Solicitors for respondent: *Bircham, Drake, & Co.*

[PRIVY COUNCIL.]

J. C.* 1882 Jan. 25, 26, 27, 31; Feb. 1; March 8.

MARY ANN RHODES . . . . . PLAINTIFF;

AND

SARAH ANN RHODES AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT AT NEW ZEALAND.

Will—Amendment of Probate refused—Construction—"From and after the Decease of my Wife"—Vesting.

Words are to be construed according to their plain ordinary meaning, unless the context shews them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity. A testator must not be presumed to intend an absurdity, nevertheless if shewn by the context or by the whole will to have so intended, the intention, if not illegal, must be carried out.

A testator after making certain dispositions in favour of his wife and others, directed that from and after the decease of his wife without leaving issue of his marriage, his trustees should stand possessed of all the undisposed of residue of his real and personal estate in trust for his natural daughter for the term of her natural life, with further provision in case of her death or marriage.

It appeared that there was no issue of the marriage, that the testator's widow was still living and that the natural daughter was still unmarried.

Held, from an examination of the whole will, that, according to the intention therein appearing, the vesting in possession of the natural daughter's estate was not postponed till after the death of the widow.

"From and after the decease of my said wife" must be construed as referring only to property in which the widow took an interest terminable at her death.

Quære, if the case arose, whether they might be construed as referring also to property in which the widow's interest failed during her life.

There is no difference between the words which a testator himself uses in drawing up his will, and the words which are *bonâ fide* used by one whom he trusts to draw it up for him. The Court in either case must take the words as it finds them, and therefore *held* that the plaintiff, the natural daughter, was not entitled to have probate amended by omitting the words "from and after the decease of my said wife without leaving issue of our said marriage," on the ground that the draughtsman introduced them with-

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* *Present*:—LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

out reason or special directions, and that the effect of the same had not been intelligently appreciated by the testator.

Where a portion of a will has been introduced through fraud or perhaps inadvertence, it may be rejected and probate granted of the remainder if the two are severable. But where the rejection of part alters the sense of the remainder, *quære*, whether there is a valid will within the meaning of 7 Will. 4 & 1 Vict. c. 26, s. 9.

APPEAL from a decree of the Supreme Court (Aug. 23, 1880) whereby the appellant's suit was dismissed, costs being reserved.

William Barnard Rhodes, the testator, died on the 11th of February, 1878, having executed a will dated 9th of February, 1878, whereof probate was granted by the Supreme Court on the 8th of March and the 21st of June, 1878.

The questions raised in the suit under the circumstances appearing in the judgment of their Lordships are:—

(1.) Whether the words "and from and after the decease of my said wife without leaving issue of our said marriage," which had been inserted in the probate (par. 64) should be omitted therefrom.

(2.) If those words are not omitted, whether under the true construction of the will, the interest of the appellant is reversionary expectant upon the death of the wife, or whether the appellant is entitled to immediate possession.

The will was, in the record and in former litigation, divided into numbered paragraphs for convenience of reference, but the original will was not so divided.

By the first twenty-three paragraphs the testator made certain bequests and devises not material to the above questions.

By the 24th he devised and bequeathed to the trustees all his real and personal estate upon trust to pay certain legacies and annuities specified in pars. 25 to 39.

Pars. 40 to 44 directed that the annual income of certain shares and debentures was to be paid to his reputed daughter, the appellant, for her life, afterwards to her issue, on her death without issue to fall into the residue.

Pars. 45 to 53 contained dispositions in favour of his widow and daughter.

Pars. 54 to 63 beginning—

"And from and after the decease of my said wife leaving issue of her marriage"

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contained various dispositions in view of the event mentioned, which did not happen.

Pars. 64 to 70 beginning—

"And from and after the decease of my said wife, without leaving issue of our said marriage,"

contained various dispositions of all the undisposed of residue of his real and personal estate in favour of the appellant, her husband and children, which are set out in the judgment printed below.

Pars. 71 to 78 gave directions as to the ultimate residue of the real and personal estate, and were followed by the concluding paragraphs, which are immaterial to this case.

Before the suit in which this appeal arose, upon a case stated by the Commissioners of Stamp Duties under the Stamp Act, 1875, s. 41, the appellant's interest under the will was considered by the Court of Appeal. Williams, Gillies, and Johnston, JJ., held that the appellant was not entitled to a life interest in possession in the residuary estate of the testator, and accordingly that duty should be assessed only on the life interest taken by her in the shares and debentures mentioned in par. 40, and in the land mentioned in pars. 52 and 53. Prendergast, C.J., and Richmond, J., held that the appellant took a life interest in possession in the whole of the testator's estate, except Highland Park, and that duty should be assessed upon that basis.

On the 27th day of November, 1879, the appellant commenced an action against the respondents, claiming to be entitled to the immediate possession and enjoyment for her life of the income of the residuary estate of the testator, and claiming that the probate of the will might be recalled, and an amended probate granted, omitting from the residuary clause the words "and from and after the decease of my said wife without leaving issue of our said marriage," on the ground that those words had been inserted by error, and contrary to the instructions of the testator, and were retained in the will at the time of its execution by the testator, without his knowledge or approval.

At the trial all parties consented, after evidence had been taken, that the jury should be discharged without a verdict, and a special case should be stated, at the hearing of which the Supreme Court (Prendergast, C.J., Williams and Johnston, JJ.)

dismissed the action. The evidence of what took place at the execution of the will and of the instructions for the will was discussed by the Court, but was held to be insufficient, even if admissible, to justify a decision in favour of the appellant on the issue as to the want of knowledge of the contents of the will by the testator. The Court accordingly answered that issue adversely to the appellant and refused revocation of the probate. With regard to the construction of the will, the Court considered itself bound by the decision of the Court of Appeal on the case stated under the Stamp Act, 1875.

Benjamin, Q.C., and *Horace Davey*, Q.C. (*Carson* and *A. L. Smith* with them), contended that the words proposed to be left out did not express the will of the testator or form part of his testamentary disposition, and ought to have been omitted from the probate. Reference was made to *In the Goods of Thomas Duane* (1), Jarman on Wills, vol. i. p. 413 [last ed.]; *Harter* v. *Harter* (2); *Guardhouse* v. *Blackburn* (3); *Fulton* v. *Andrew* (4).

Assuming that those words are retained, it was argued that, nevertheless, upon the true construction of the will, the appellant was entitled to a life interest in possession in the whole residuary estate, including the Heaton Park estate, and to a life interest in remainder (expectant on the death or second marriage of the widow) in the Highland Park estate. As to general principles of construction, see *Abbott* v. *Middleton* (5) and *Ralph* v. *Carrick* (6). There are three possible constructions (1) that the widow took a life estate; (2) that the appellant took an immediate life estate; (3) that there was an implied direction to accumulate during the widow's life. Although the words in question, without explanation derived from the combined effect of all the other directions contained in the will, would operate to defer the appellant's possession till after the death of the widow, or even to render the vesting of the estate in her then children contingent upon the widow's death without issue living at her decease; yet such a construction ought,

(1) 2 Sw. & Tr. 590.
(2) Law Rep. 3 P. & D. 11.
(3) Law Rep. 1 P. & D. 109; 35 L. J. (Prob.) 116.
(4) Law Rep. 7 H. L. 448.
(5) 7 H. L. C. 68.
(6) 11 Ch. D. 877.

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if possible, to be avoided, and in this case involves absurdity. "Leaving issue" and "without leaving issue" in the two preambles do not exhaust all possible alternatives, unless the latter is read as meaning "in case there never shall be such issue or if there be any such issue, on the estates given to such issue failing." "From and after the decease of my said wife," must be construed distributively and confined to such property as she took an interest in terminable at her death or otherwise, and not as referring to property in which the widow took no interest at all. Reference was made to *Wilson* v. *Wilson* (1); Jarman on Wills, vol. i., p. 304 [last ed.]; *Countess of Bective* v. *Hodgson* (2); *Genery* v. *Fitzgerald* (3); *Doe* v. *Brazier* (4); *Cook* v. *Gerrard* (5); *Rex* v. *Inhabitants of Ringstead* (6); *Dyer* v. *Dyer* (7); Jarman on Wills, vol. i. p. 799 [last ed.]; *Davenport* v. *Coltman* (8); *Attwater* v. *Attwater* (9); *Aspinall* v. *Petvin* (10); *Maitland* v. *Chalie* (11); Jarman on Wills, vol. ii., c. 49, p. 823; *Simpson* v. *Hornby* (12); *Boon* v. *Carnforth* (13); *Lill* v. *Lill* (14); *Simmons* v. *Rudall* (15); *Luxford* v. *Cheeke* (16); and *Underhill* v. *Roden* (17).

LORD BLACKBURN:—Their Lordships do not require to hear the counsel for the respondents on the question of amending the probate, but only upon the question of construction.

The *Attorney-General* (*Sir H. James*, Q.C.) and *Rigby*, Q.C. (*Jeune* with them), for the respondents, contended that the words "from and after the decease of my said wife without leaving issue of our said marriage," should be construed literally and according to their plain meaning. Their effect is that the appellant takes only a life reversionary interest in the residuary estate of the testator, expectant on the death of the widow. Reference

(1) 1 Sim. N. S. 288.
(2) 10 H. L. C. 656.
(3) Jac. 468, 470.
(4) 5 B. & A. 64.
(5) 1 Saund. 181, cited in 5 B. & A. 68.
(6) 9 B. & C. 218.
(7) 1 Mer. 414.
(8) 9 M. & W. 481, and 12 Sim. 588.
(9) 18 Beav. 330.
(10) 1 S. & S. 544.
(11) 6 Madd. 243.
(12) Gilb. Eq. Rep. 115; S. C. 2 Vern. 723.
(13) 2 Ves. Sen. 277.
(14) 23 Beav. 446.
(15) 1 Sim. N. S. 115.
(16) 3 Lev. 125.
(17) 2 Ch. D. 494.

was made to 1 Jarman [3rd ed.], p. 505; *Weatherall* v. *Thornburgh* (1); *Abbott* v. *Middleton* (2). A distributive construction should not be resorted to in this case: see *Rex* v. *Ringstead* (3). It is contrary to the spirit as well as the letter of the will and to the testator's intention to give to the appellant a present interest in the residuary estate. The cases cited on the other side are distinguishable, and see *Horton* v. *Horton* (4), *Stevens* v. *Hayle* (5).

Benjamin, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD BLACKBURN:—

The plaintiff, Mary Anne Rhodes, brought a suit in the Supreme Court of New Zealand against the executors and trustees of the will of William Barnard Rhodes, deceased, and the parties who took interests under that will adverse to her own, which will had been proved, as it was executed, and she "claims that the probate of the said will be recalled, and an amended probate granted, omitting from the residuary clause of the said will the words 'and from and after the decease of my said wife without leaving issue of our said marriage.'

"And further, that it may be declared by the decree of this Honourable Court that the plaintiff is entitled, under the trusts of the said will, to the immediate possession and enjoyment of the moneys arising and to arise from the residuary estate of the testator."

The Court pronounced against both claims, and dismissed the suit. Against this decision the present appeal is brought. It is necessary, first, to consider whether the plaintiff is entitled to have the probate amended by omitting the words referred to; for the second claim which depends on the true construction of the will cannot properly be disposed of till it is ascertained what forms the will.

And their Lordships, at the close of the argument for the

(1) 8 Ch. D. 261, 268.
(2) 7 H. L. C. 68.
(3) 9 B. & C. 218.
(4) Cro. Jac. 74.
(5) 2 Dr. & Sm. 28.

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appellants, intimated that they had no doubt that this part of the decision of the Court was right, and that no ground had been shewn for altering the probate.

The law of New Zealand, like that of England, requires that a will should be in writing, and executed by the testator, before witnesses, in a particular manner.

When an instrument purporting to be the will of the deceased person has been executed by the deceased in the proper manner, but it is sufficiently proved that though he executed the instrument, yet that from fraud he executed that which was not his will there is no difficulty in pronouncing that the instrument is not his will. And it has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or perhaps from inadvertence, such as that *In the Goods of Duane* (1), the instrument which he actually executed contained also something which was not his will, this latter part is to be rejected. And in such a case, if this latter part is so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the Statute of Wills, the execution of what was shewn to be the true will, and something more, may be treated as the execution of the true will alone. A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the Court is convinced that the words were improperly introduced, so that if the instrument was inter vivos they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 Will. 4 & 1 Vict. c. 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning. It has never, as far as their Lordships are aware, been necessary to decide as to this, though the judgment of Sir James Hannen in *Harter* v. *Harter* (2), has some bearing on it. And their Lordships think it unnecessary and therefore improper now to express any opinion on this question, for the evidence does not raise it.

(1) 2 Sw. & T. 590.

(2) Law Rep. 3 P. & D. 11.

Mr. Hart, who drew the will, was called as a witness, and it is agreed that all he said was quite true. He had received instructions and prepared a draft will in which, thinking it impossible that the dying man could have children, he made no provision for them. The testator, on this draft being brought to him, desired that the provisions in a former will in favour of his issue should be restored. As it turned out, the testator died two days afterwards and there was no posthumous child, and those provisions took no effect. Mr. Hart not only inserted the provisions required, but prefaced them by the words, "and from and after the decease of my said wife leaving issue of our marriage," and at the end united them to the subsequent part of the draft will by inserting the words, "and from and after the decease of my said wife without leaving issue of our said marriage." This he did without any directions from the testator to insert such words, and having no particular reason for inserting them, except that he thought they would come in in an ordinary will. He took the will, when fairly copied, to the testator for execution, and it was read over to him, he being then of disposing mind, though very ill. It is now said that the effect of those latter words was to change the whole effect of the subsequent part of the will, and so defeat the testator's intentions. Whether those words had that effect or not is a question on which the Supreme Court of New Zealand, consisting of five Judges, have been divided in opinion, and the same question has occupied several days of elaborate argument before their Lordships. It is impossible to suppose that the testator had an intelligent appreciation of the effect of these words at all, and Mrs. Rhodes, his widow, who is called as a witness, says that just after the execution of the will he told her that he could hardly say he had heard the will read at all, adding, "But I think it is sure to be all right, because Mr. Hart is an honest man, and I trust him." This is exactly the state of mind which, without any such evidence, their Lordships would have inferred to be that of the testator.

Their Lordships think that there is no difference between the words which a testator himself uses in drawing up his will, and the words which are bonâ fide used by one whom he trusts to draw it up for him. In either case there is a great risk that

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words may be used that do not express the intention. There probably are very few wills in which it might not be contended that words have been so used. However this may be, the Court which has to construe the will must take the words as they find them.

Their Lordships therefore proceed to consider the claim of the plaintiff that it may be declared that the plaintiff is entitled, under the trusts of the will, to the immediate possession and enjoyment of the moneys arising and to arise from the residuary estate of the testator.

Whether she is or is not so entitled depends on the true construction of the will. The same will had been before the Court of Appeal in New Zealand on a case stated under the provisions of the New Zealand Stamp Act. The statement in that case is concise, and is as follows:—

"On the 9th February, 1878, the said William Barnard Rhodes made his last will and testament, a copy of which is hereunto annexed. Whereby, after making certain dispositions in favour of his wife, Sarah Ann Rhodes, and others, not affecting the question at issue, directed that from and after the decease of his said wife without leaving issue of his said marriage, his trustees should stand possessed of all the undisposed of residue of his real and personal estate in trust for his natural daughter, Mary Ann, for and during the term of her natural life, with further provision in case of her death or marriage.

"The testator died on the 11th day of February, 1878, without having revoked his will, and the same has been duly proved in the Supreme Court at Wellington.

"There is no issue of the marriage of the testator with the said Sarah Ann Rhodes, who is still living.

"The testator's natural daughter is still unmarried and is of the age of twenty-six years or thereabouts.

"The executors of the said will have filed with the Commissioner of Stamp Duties the statement of property required under Part III. of the said Act, and by this statement it appears that the value of residuary estate which is alleged to be the subject of the above-mentioned trust has been assessed at £272,796 0*s.* 5*d.*

"The dutiable value of this sum on a life of twenty-six years of

age, at £10 per centum, in accordance with the third schedule of the said Act is £18,405 5*s.* 5*d.*

"This duty has been so assessed by the Commissioner in accordance with the provisions of Part III. of the 'Stamp Act, 1875,' on the ground—

"That there being no life interest immediately preceding that taken by the natural daughter of the testator, the duty is payable immediately on his death, and has been paid by the executors accordingly.

"The Heaton Park estate, valued at £74,970 17*s.* 6*d.*, and Highland Park estates, valued at £10,600, have been included in the foregoing valuation.

"The executors are dissatisfied with this assessment, and appeal against the same on the grounds following:—

"1. That looking to the terms of the will, the alleged life interest of the natural daughter of the testator is not in possession but is contingent upon her surviving the widow of the testator, and that, pending the determination of that contingency, the income should be accumulated for the benefit of the person or persons who would then be entitled thereto.

"2. That the 'Stamp Act, 1875,' makes no provision for the immediate payment of duty in respect of unascertainable and contingent future interests.

"The Commissioner adheres to the assessment already made and the executors have requested him to state a case as provided by the said Act.

"The questions for the decision of the Court under the said Act are,—

"1. Whether the assessment made by the Commissioner can be sustained under Part III. of the said Act, or whether he is precluded from making such assessment on the grounds alleged by the executors, or any of them?

"2. If the assessment made by the Commissioner cannot be sustained, what duty ought he to have assessed under the said Act in respect of the interest appearing to be taken by the natural daughter of the testator under his said will?"

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The copy of the will annexed to this case was, for convenience of reference, divided into paragraphs, which were numbered. The will itself was not so divided, and unless this is remembered, the division into paragraphs may mislead, especially as, in more instances than one, the gentleman who divided the will into paragraphs has broken into several sentences what in the will was obviously one sentence. But the numbers of the paragraphs afford a convenient mode of referring briefly to the particular passage in the will to which it is desired to call attention, and this convenience has, in the present record, been retained without any disadvantage by printing the will as it was actually drawn up, and printing on the margin opposite to each passage which had been made a paragraph the number which had been attached to that paragraph, thus affording facility by use of the figures to refer to the passages meant, without any risk of misleading by its being supposed that the testator had broken up these passages into separate sentences.

In the Court of Appeal in New Zealand, Williams, J., answered the questions put in the case on the Stamp Act, thus—1. The assessment made by the Commissioner cannot be sustained. 2. The duty should be assessed only on the life interest taken by the natural daughter in the bank shares and corporation bonds mentioned in par. 40, and in the land mentioned in par. 52 and 53. Gillies, J., answered them,—1. That the assessment made by the Commissioner cannot be sustained on the ground that the testator's natural daughter takes no life interest in the residue until the decease of the widow, and even then takes no life estate in Highland Park or Heaton Park estates.

The latter part of this answer was on a point which, as far as regards Highland Park estate, cannot arise so long as Mrs. Rhodes continues to fulfil the conditions under which by the parts of the will which, for convenience, may be referred to as pars. 46, 47, 48, and 49, she enjoys that estate. Miss Rhodes can on no construction of the will take an estate in possession in what is enjoyed by the widow, though she may take a vested estate in Highland Park subject to the widow's interest. As far as regards Heaton Park estate the question does not yet arise, if what is given to Miss Rhodes is not to vest in possession till after

the decease of the widow. But if what is given to Miss Rhodes in other property than Highland Park vests at once in her on the death of the testator, it is necessary to say whether Heaton Park estate is given to her or not, and both points may be material in construing the will. Gillies, J., answers the second question as Williams, J., did.

Johnston, J., did not give specific answers to the two questions, but with considerable hesitation expresses his opinion thus:—

"On the whole I do not see on the face of the will itself any such distinct evidence of the intention of the testator, that his daughter (already provided for by pars. 43, 49, and 52), should enjoy the residue before the death of the widow, as ought, in my opinion, to override the application of the words of par. 64 in their ordinary sense to the provisions of par. 65. I do not feel quite sure that par. 65 applies to the Highland and Heaton Park estates, or that if it does, the authorities on distributive construction warrant the application of the doctrine to pars. 64 and 65. In conclusion, I wish it to be understood that I have formed, and that I express, my opinion upon this embarrassing case with much diffidence and uncertainty."

Richmond, J., in whose opinion Prendergast, C.J., concurred, says:—

"In this case the question is whether Miss Rhodes is entitled under the will of her father to an immediate life interest in his residuary real and personal estate. This, again, depends upon the interpretation of words which occur in more than one part of the will, and which, literally understood, would postpone the vesting in possession of Miss Rhodes' estates until the death of the testator's widow."

After an elaborate examination of the will and the authorities, he says:—

"On these grounds, I am of opinion that Miss Rhodes takes a life interest in possession in the whole estate, except Highland Park, and that duty is to be assessed upon this basis."

So that, on the construction of this will three of the Judges against two held that the words referred to did postpone the vesting in possession of Miss Rhodes' estate until the death of the

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widow. This decision was not between the same parties, and is not in any way res judicata. But it was properly considered by the Judges in New Zealand an authority binding on them, and therefore they refused to make the declaration asked for. On the appeal before this Board the opinions of these learned Judges were properly relied on as weighty authorities in favour of the respondents and the appellant respectively, but they were not and could not be relied on as binding upon this Board; nor is that decision now before their Lordships, so that they can reverse it. If the decision of their Lordships in the case now before them should shew that the opinion of Richmond, J., was the right one, it will follow that the revenue authorities in New Zealand have not received payment of a large sum which they ought to have received; but the revenue authorities must take what steps they think fit to obtain payment of it, notwithstanding the previous decision of the Court of Appeal. If the revenue laws of New Zealand are framed as carefully as those of this country, there will be little difficulty in their doing so.

The general rule as to the construction of wills has often been laid down, and generally in terms not substantially differing from each other. About thirty years ago there did arise a great difference of opinion amongst the noble and learned Lords who then sat in the House of Lords as to the manner in which that rule should be applied.

In *Grey* v. *Pearson* (1), Lord Cranworth and Lord Wensleydale came to one conclusion and Lord St. Leonards to another. The opinion of the majority prevailed, and that decision is binding on all Courts (including the House of Lords itself) on any will similar to that then in question.

Soon after, in *Abbott* v. *Middleton* (2), a question arose respecting the construction of a will, in which the then Lord Chancellor, Lord Chelmsford, and Lord St. Leonards applied the rule one way, and Lords Cranworth and Wensleydale applied it the other way; and consequently, there being an equal division of the House, according to the rule of the House of Lords, the decision appealed against stood affirmed. But there was not any difference of opinion as to what was the rule; indeed, it is curious to

(1) 6 H. L. C. 61. (2) 7 H. L. C. 68.

observe that Lord St. Leonards, who was for construing the particular words as expressing an intention different from that which was the primâ facie meaning of those words, lays down the rule, at p. 94, more stringently than Lord Wensleydale, who went as far as any one in adhering to the literal meaning, does at p. 114, where he makes his favourite quotation from *Warburton* v. *Loveland* (1). The same question came again before the Lords in *Thelluson* v. *Rendlesham* (2). There was there a difference of opinion among the Judges who were consulted, but there was none amongst the Lords. Lord Cranworth says (p. 494):—

"The rule on which the appellant relies is that universally recognised and acted on, namely, that words are to be construed according to their plain ordinary meaning unless the context shews them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is, perhaps, involved in the former, for, supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to shew that the words could not have been used in their ordinary sense."

Lord Wensleydale once more repeated the rule as laid down in *Warburton* v. *Loveland* (1), but it is worth observing that by "an absurdity" can hardly be meant a result which the Court who construe the will thought ought not to have been the intention of the testator. If that had been so, the Thellusson will itself would have been upset. Lord St. Leonards says, p. 509, that much thought and learning had been bestowed for the purpose of endeavouring "to counteract, and properly too, if it could be done, the ambitious views of the testator," but the intention was too clearly expressed. Lord Cranworth, therefore, seems quite correct when he says that the latter branch of the rule is but a means by the context of shewing that the words were not used in their ordinary sense, as it is not to be presumed that the testator meant an absurdity; but that if it is shewn that it was intended to use them so as to work this absurdity, that intention, if it be not illegal, must be carried out.

Taking this as the rule, it must in every will where the point

(1) 1 Huds. & Br. (Ir.) 648. (2) 7 H. L. C. 429.

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arises be a question of more or less. The Court has to say what was the intention as appearing from the whole will. Cases can be of but little use, for the words of one will are seldom the same as those of another; but, no doubt, when it has been held that a particular devise indicates an intention so strong that other words must be strained to give way to it, that is a great help to those who argue that other words must give way to a similar devise; and where it has been held that some particular words indicate so strongly an intention that they cannot be strained to give way to a general indication of intention, it is a help to those who argue that they should not give way now.

Starting with this as the rule of law, it seems that the question now raised is whether there is an indication of intention on the whole will that certain interests should be vested immediately on the testator's death, as regards the bulk of his property in possession, and as to Highland Park estate subject to the life interests given in it, sufficiently clear to require the Court which has to construe that will to say that words which, literally understood, would express an intention to postpone the vesting of those interests till after the death of Mrs. Rhodes, must be construed as expressing an intention consistent with those interests being vested, though that intention is not that which, but for the context, would be understood from the words used in their ordinary sense, and is one which would have been more aptly expressed in other words; or whether the intention to postpone is so clearly and strongly expressed that the Court is required to give the words that effect, notwithstanding the other parts of the will, which tend to the conclusion that the intention was to vest.

And it seems impossible to answer this question without examining the whole will at perhaps tedious length. For every indication of intention that those interests should vest adds great strength to those that go before or come after. The force of the whole of such indications taken together is far greater than the sum of the forces of each taken separately.

Their Lordships think that there is enough to produce not a mere conjecture that the intention was to make the estates vested, but to produce in their minds a conviction that this was intended.

In order to explain their reasons for this, it is necessary to examine the whole will.

It is not necessary to notice the earlier part of the will, further than to say that the testator, by a part of the will called paragraphs 40 to 44, both inclusive, directs his trustees to pay the income arising from some bank of New Zealand shares and some debentures to the separate use of the now appellant, and from and after her death to divide the capital amongst her issue, but if she die without leaving any such issue, the capital to fall into his residuary estate, with powers for the maintenance and advancement of her issue during their minority. It is material to observe that no power is hitherto given to settle anything for the benefit of the husband of the appellant. The testator next makes provisions for his widow, Mrs. Rhodes, of which it is only necessary to observe that he gives her an interest in Highland Park estate, and an annuity of £2000, so long as she should continue his widow, which interest would necessarily come to an end on her death; though it might come to an end sooner. There is an optional power to set aside ten acres of Highland Park estate for the purpose of building a house to be settled on his daughter, the appellant, for life, and on her husband for life, if he survived her. The remainder in Highland Park estate is not yet disposed of, nor is Heaton Park estate disposed of, nor the residue of the testator's real and personal estate, which was large.

And here, before examining the will further in detail, it may be well to state what seems to have been the general scheme of the will. The testator was married but had no children, and there was not much prospect of his having any. He had a natural daughter, Mary Ann, the now appellant, for whom he makes a provision in the part of the will just stated, such as to shew that she was the object of his care and affection, and that he expected that on his death she would live with his widow, and be treated by her as she would have treated a legitimate stepdaughter. He had also collateral relatives. He had two landed estates, Highland Park estate, where he lived, and Heaton Park estate, and other real and personal estate of great value.

After creating by the earlier part of the will trusts which do not affect the great bulk of his property at all, and which do not

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affect the inheritance of Highland Park estate, the testator makes a variety of provisions (from what is called par. 54 to what is called par. 63 inclusive), all dependent on there being issue of his wife of their marriage, but as there never was such issue none of those ever came into operation. But from this it clearly appears that he preferred his issue by his wife, if he should have any, to Mary Ann. Next he proceeds to make a series of provisions (from what is called par. 64 to what is called par. 70), all for the benefit of Mary Ann, her future husband, and her future children. As Miss Rhodes is not yet married, the only question which yet arises is as to what she takes under this set of provisions, and the principal question is whether she takes anything under them so long as Mrs. Rhodes, the widow, lives. But those provisions clearly shew that the testator preferred Mary Ann and her children to his collateral relatives. Next by provisions (in what is called par. 71 to the end of the will), he gives his whole property in five shares to different collateral branches of his family. But they are not to take anything till Miss Rhodes' death, nor unless Miss Rhodes' children, if there should be any, have died, if sons, under twenty-one, or, if daughters, under that age and unmarried. And one thing clear in pars. 71 and 78 is that, supposing the testator's own issue and Mary Ann and her issue all out of the way, the collaterals are to take the ultimate residue, whatever that may include, at once, and not to wait for the death of the widow, unless some words in par. 67 postpone their right to Heaton Park and Highland Park till her death. Now the collaterals are postponed to all the testator's issue and to Mary Ann and her issue. Why persons so postponed in the order of gifts should be preferred in the one respect that, if they take at all, they are not to wait for the widow's death, is so difficult to understand, that it would of itself suggest a serious doubt whether the will does really direct the prior takers so to wait.

It is necessary, before going further, to dispose of one question. The testator begins a portion of his will by the words "and from and after the decease of my said wife leaving issue of our marriage," and follows this by a series of provisions none of which could come into operation at all unless there were some issue of their marriage, and then begins a subsequent set of provisions

with the words "and from and after the decease of my said wife without leaving issue of our said marriage." Their Lordships think that, whatever be the effect of those words preliminary to the introduction of the provisions for the issue of the marriage, they must affect all such provisions. It might be a question if this would be so if there had not been such a marked division of the will into two parts, but, as it is, they think the words at the beginning of what is called par. 54 must be considered as a preamble to, and affecting, all the provisions down to what is called par. 63 inclusive.

And this brings us to the part of the will which requires detailed examination. The testator has made provisions for numerous issue. As it has turned out, no such issue ever came into existence, but it is proper to examine what provisions he did make for his issue by his wife, in order to ascertain his intentions, and it is the more necessary to consider this, because the preamble to the provisions in favour of his issue, "and from and after the decease of my said wife leaving issue of our marriage," and that which is called par. 64, "and from and after the decease of my said wife without leaving issue of our said marriage," which forms the preamble to the subsequent devises and bequests which have come into operation, and which have now to be construed, are evidently relative to each other, and must be construed on the same principle. The testator, by the latter part of what is called par. 54, and by 55, and 56, makes provisions which, but for the preamble at the beginning of 54, would be perfectly clear and sensible. He gives Highland Park, subject to the life interests already created, and Heaton Park estate to his sons successively in tail male, with remainder to his sons successively in tail general, with remainder to his daughters successively in tail male, with remainder to his daughters successively in tail general, and in default of such issue directs that Highland Park and Heaton Park estates "shall, after the decease of my said wife, and such last mentioned failure of issue, go and be as hereinafter in that behalf set forth." There can be no doubt, if the preamble were not there, that these successive estates tail would all be vested estates tail. Then he gives "all the residue of my real and personal estate" (and it appears that he had real estate besides

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Highland Park and Heaton Park estates, and large personal estate), "upon trust for my children by my said wife who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or be married previously with the consent of my wife, and the issue of such of these as may be dead leaving issue, in equal shares and proportions." There can be no doubt (but for the preamble), that, if an only child, being a daughter, married when under age with the consent of the widow (which could only be given during her life), the whole of this fund would then become vested in the daughter, the very object of making it vest then being that a proper settlement might be made on her marriage. But the preamble, "and from and after the decease of my said wife leaving issue of our marriage," is there, and giving these words their natural and ordinary sense none of the estates given to the issue are to vest till the widow dies. So that, in the possible event of her surviving to see her grandchildren, neither Highland Park in which she had an interest, nor Heaton Park and the rest of his real and personal estate in which she had nothing, would vest so long as she lived. So far as regards the estates tail, this would prevent any dealings with the land, though she had a son who attained twenty-one, and wished to marry, and on his marriage to settle these estates, and the rents of Heaton Park estate would accumulate for the benefit of those who ultimately took the residue, until the period prescribed by the Thellusson Act had elapsed, and then go to the heir-at-law. There are express provisions as to the accumulations of income for Mary Ann's children after her death and during their minorities, and to those for his own children after the widow's death and for some period not so precisely defined. These directions are not easily to be reconciled with his total silence about accumulation during the supposed suspension of enjoyment for the widow's life. The testator was alive to the propriety of accumulation while there could be no complete enjoyment of the property. The fact that he has directed none during the life of his widow points strongly to the conclusion that accumulation of income for that period is no part of his plan. Besides this, such a scheme would at least be exceedingly inconvenient, and such a devise would be emi-

nently injudicious; whether it would amount to an obvious absurdity within the meaning of the rule as laid down in *Warburton* v. *Loveland* (1) or not, might be made a question. Considering how many very strong decisions there are for construing wills so as to favour early vesting, their Lordships are by no means prepared to say that this alone would not be a sufficient ground for modifying the sense of the words of the preamble. But when it is found that the testator has declared his intention to be that his daughter, if he has one, should, on marrying with the consent of his widow (and consequently in her lifetime), take a vested interest in the rest of the real estate and the personal estate, to put the construction on that preamble that this possible daughter shall take nothing till the widow dies, is not merely an absurdity, but a repugnance and inconsistency such as to justify a modification of the words of the preamble so far as to avoid these consequences, and these consequences are avoided by construing these words as meaning "if there shall be issue of our marriage, then when the interest of my wife in Highland Park terminates, which it will, at all events, do on her decease as to the Highland Park estate, and as to the rest in which she takes no interest at once." It is quite true that thus understood the words are quite useless, merely idle; but their Lordships think this is no more than an example of the maxim "superflua non nocent." It is also true that this makes the estates given in Highland Park estate to commence on the termination of the widow's interest, which may happen while she yet lives. It is not, perhaps, necessary to decide what would be the case in an event which has not yet happened, and may never happen; but the provisions in the portion of the will divided into the pars. 58 to 63, inclusive, are strong to shew that the testator thought that his widow, whilst she remained such, should have the means to provide for his and her children during their minority, along with an allowance of £200 a year for each child during its infancy; but on her death or marriage he makes provisions for the advancement and maintenance of his children during their minority, to provide for such children, indicating that he supposed that her ability to provide for them would cease, not

(1) 1 H. & B. 648.

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only on her death, but on her marriage. But there is no provision whatever for any advance for the benefit of a child having attained twenty-one after the widow's marriage whilst she still lives. This looks as if he thought that on her marriage as well as on her death the child would come into possession of what had been given her during widowhood; and also that the portions which were vested in the children on attaining twenty-one would come into possession, so that the children would need no further advance though the widow still lived. Certainly strengthening the inference to be drawn from the earlier provisions.

The draftsman evidently supposed that by the two provisions, "from and after the decease of my wife leaving issue of our marriage," and "from and after the decease of my wife without leaving issue of our said marriage," he had provided for everything. Taking these words in their literal sense, it would follow that if Mrs. Rhodes had had a posthumous child which died before her, this large property was to go to Miss Rhodes; but if the posthumous child survived Mrs. Rhodes, though only for a few seconds, no portion of it was to go to her. This is so capricious and absurd that it was hardly contested on the argument that the words "without leaving issue of our said marriage" must be read as meaning "in case there never shall be such issue, or if there be any such issue, on the estates given to such issue failing," but it was strongly urged that all was postponed till Mrs. Rhodes died. If the construction of the words forming the preamble to the devises and bequests to the testator's own children, which has been already indicated, is the correct one, it would follow that a similar construction should be put on those words here. And the subsequent provisions in the will greatly fortify this.

The part of the will which is referred to as pars. 64, 65, 66, and the beginning of what is referred to as par. 67, is as follows:—

"And from and after the decease of my said wife without leaving issue of our said marriage. And subject to the foregoing devises legacies bequests and directions I direct that my said trustees shall stand possessed of all the undisposed of residue of my real and personal estate in trust for my said natural daughter Mary Ann for and during the term of her natural life. But if

she shall marry then I direct that my said trustees shall stand possessed as well of the said last-mentioned trust property as of the said four hundred and one New Zealand bank shares and sum of ten thousand pounds herein-before mentioned in trust to pay the annual income arising therefrom to my said reputed daughter for the term of her natural life for her sole and separate use but without power to alienate or anticipate the same and her receipts alone to be sufficient discharges for such payments And from and after her decease upon trust to pay her husband if he shall survive her during his life the sum of six hundred pounds per annum payable quarterly And from and after the decease of my said natural daughter leaving issue subject as aforesaid I direct &c."

And then follow trusts for the sons and daughters of Miss Rhodes successively in tail; and then the will proceeds,"and in default of such issue then I declare and direct that the said several properties shall after the death of the survivor of them my said wife and reputed daughter and such failure of issue as aforesaid become and be part of my residuary estate." Reliance was, in the argument, placed for the appellant on the word "several" as indicating an intention to use words distributively, and for the respondents on the words "the survivor" as indicating a contrary intention. It is rather too narrow a ground for drawing a conclusion either way.

There then follow provisions, designated as pars. 68 and 69, which it is not necessary to set out at length, though they must be referred to afterwards, and then follow important provisions designated as pars. 70, 71, and 72, which it is as well to set out in their very words:—

"(70.) And subject and except as aforesaid as to all the residue of my real and personal estate and the annual income arising therefrom I direct that from and after the decease of my said daughter and subject to the payment of the annuity to her husband during his life the same shall be held in trust for all and every the child and children of my said reputed daughter who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or pre-

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viously marry as tenants in common, and also during the minorities or respective minorities of any child or children of my said reputed daughter I direct that the trusts for maintenance education and bringing up of child or children out of income of expectant share or shares and accumulation and investment of surplus and use of expectant income of shares in common and raising and applying not exceeding half of expectant share for advancement in the world hereinbefore set forth as applicable to the expectant shares or succession of the children or child of my said daughter hereinbefore set forth shall be herein implied and made applicable to the expectant shares or succession of the children or child of my said daughter last hereinbefore provided (71) And in case there shall be no children or child of my said marriage who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry and there shall be no children or child of my said daughter who shall being a son live to attain the age of twenty-one years or being a daughter shall live to attain that age or marry (72) then subject to the preceding provisions of this my will as to the ultimate residue of my real and personal estate"

he makes a bequest over. This completes the will as far as regards the bequests for the benefit either of his widow, and his issue by her, or of his reputed daughter, and her husband, should she marry, and her issue, and contains all to which it is necessary to refer for the purpose of deciding the question now before their Lordships.

And now it is proper to consider how the testator disposes of the reversion in Highland Park estate subject to the life interests created in it, and the reversion in Heaton Park estate in which there are no estates for life granted after the estates tail have come to an end. Those reversions have not, down to that part of the will which is designated as par. 65, been disposed of further than by saying that they are "to go and be as hereinafter in that behalf set forth." Are they to be included in "the undisposed of residue of my real and personal estate" which is left to Miss Rhodes for life? They certainly are, in the ordinary natural sense of the words, so included, and as both reversions are after

her decease settled in tail on her children, there seems every reason for construing the words in their natural sense. Mr. Justice Gillies says that "hereinafter in that behalf set forth" cannot possibly have any meaning unless they refer to the devises of estates tail in these estates to the children of his reputed daughter. Their Lordships are unable to agree in this. They think they naturally refer to the estate for life given to his daughter, subject to which those estates tail are given.

Then it is to be observed that the income arising from the bank shares and the £10,000 had already, by what is referred to as par. 41, been settled to the separate use of Miss Rhodes, and the income from them was certainly payable to her whether Mrs. Rhodes was alive or not. It seems to their Lordships that when the testator directs his trustees to stand possessed as well of the last mentioned trust property as of the bank shares and £10,000 in trust to pay the annual income, &c., he almost expressly declares that the income arising from the trust property shall like the income arising from the bank shares be paid to her whether Mrs. Rhodes is alive or not. It is true that this cannot be done with regard to any property the income of which is given to Mrs. Rhodes, so long as Mrs. Rhodes lives and is entitled to receive it, and this is provided for by the words "subject to the foregoing devises, legacies, bequests, and directions." It is also provided for by the words of the preamble, "from and after the decease of my said wife," which if applicable only to such property as she took an interest in may be useless tautology; but if applicable also to the income of Heaton Park estate, and of the large residue of his real and personal estate, are in direct conflict with the direction to treat it like the income of the bank shares, and this affords a strong argument that these words were not meant to have the effect of postponing Miss Rhodes' interest till Mrs. Rhodes' death. The provisions designated as pars. 68 and 69 have a tendency the same way, but as these provisions are not very clear, and apparently interfere with the life interest of the daughter, as soon as a son attains twenty-one, their Lordships do not so much rely on that. But the provisions as to the distribution, after the death of his daughter, of the residue of his real and personal estate amongst the children of his reputed daughter who

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attain the age of twenty-one, or being daughters previously marry, are, their Lordships think, very strongly in favour of the appellant. All that has been already said in commenting on what are called pars. 54 and 55, as to the incongruity of giving estates tail, and vesting portions at a period when Mrs. Rhodes, who took no interest in the bulk of this property, might be alive, and yet making them all contingent till her death, is applicable here, except that there is not in this part of the will an express reference to Mrs. Rhodes being alive at the time when the portion of a daughter vested on her marriage, for it is not here provided that the marriage shall take place with Mrs. Rhodes' assent.

And the bringing down and applying to the expectant shares of the children in the residue of the real and personal estate of the maintenance and education clauses, already given in what are called pars. 43 and 44, as to the bank shares and £10,000 are also strongly in favour of the appellant. Those clauses were very properly made applicable to the case of children being minors after the death of their mother, the testator's daughter, and had not and could not have any reference to the life of Mrs. Rhodes. If the words of the so-called par. 64 are construed as confining the application of the words "after the decease of my wife" to the bequests and devises of property in which she took an interest, those maintenance and advancement clauses are very properly brought down and applied to the shares given to the children in the residue of the real and personal estate in which Mrs. Rhodes took no interest. If the words in the preamble are read as applying to all, and postponing the shares so long as Mrs. Rhodes lives, they are not applicable, and a child of the daughter who is left a minor on the death of her mother, though likely to have a very large portion, is left unprovided for so long as Mrs. Rhodes lives. This seems to their Lordships what the testator did not intend.

All absurdity and incongruity is removed if the words "leaving issue" and "without leaving issue" in the two preambles are construed as having been from the rest of the will shewn to have been used in the sense already indicated, and if the words "from and after the decease of my said wife" are construed as having been shewn to have been used as confined to such property as she

took an interest in terminable at her death; construing it, as it is commonly said, distributively, or as it is perhaps more properly said, reddendo singula singulis. Whether it is proper to construe them as also meaning on the failure of the interest before her death is a question which does not arise yet, and may never arise, as Mrs. Rhodes may never marry. Their Lordships do not therefore decide this, though they wish to say that they are not to be understood as expressing an opinion against this construction.

Their Lordships do not think that, to construe a particular set of words reddendo singula singulis is properly to be called putting on them a meaning contrary to the plain and natural sense of the words; the subject matter and context may be such as to make such a construction the most obvious and natural construction, though probably it requires some context to justify it. Much of the argument of the respondents was based upon *Rex* v. *Ringstead* (1), which was the joint judgment of Bayley, Littledale, and Parke, JJ. (afterwards Lord Wensleydale). It is said, "there is no doubt that, in furtherance of the manifest intention of the testator, general words which, taken in their ordinary grammatical sense, apply to the whole property devised, may be taken distributively, and that, reddendo singula singulis, they may be applied to that part of the property to which they appear by the context to be applicable, so as to suffer other property to which, in their grammatical sense, they would apply, to pass immediately. But, in order to warrant such a construction, it must appear manifestly from the other parts of the will that that was the intention." In *Rex* v. *Ringstead* the Court thought it was not the intention. Their Lordships do not intend to express any opinion as to whether the Court were or were not right in so holding, nor as to whether they succeeded in reconciling their decision with others. It is enough for their Lordships to say that they are convinced that in this will it does appear manifestly from other parts of this will that such was the intention.

The result is that, in the opinion of their Lordships, the decree dismissing the appellant's suit should be reversed, and that instead thereof, the Court should declare that, according to the true construction of the will, and in the events which have happened, the

(1) 9 B. & C. 218.

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appellant has become entitled to the present enjoyment of the interest by the said will given to her for her life in all the undisposed of residue of the testator's real and personal estate, including therein Heaton Park estate, subject only to the foregoing devises, legacies, bequests, and directions. They further think that the costs of all parties to all the proceedings in the colony, as well as of this appeal, as between solicitor and client, should be paid out of the estate. And they will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellant: *Paines, Layton, & Polloek.*
Solicitors for trustees of the will: *W. & J. Flower & Nussey.*
Solicitors for the other respondents: *Lee, Bolton, & Lee.*

[HOUSE OF LORDS.]

R. JOHNSTON & Co. . . . . APPELLANTS;

AND

ARCHIBALD ORR EWING & Co. . . . RESPONDENTS.

H. L. (E.) 1882 March 6.

Trade-mark—Injunction.

No trader has a right to use a trade-mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers.

The use of such a trade-mark may be restrained by injunction, although no purchaser has actually been misled; for the very life of a trade-mark depends upon the promptitude with which it is vindicated.

So *held*, affirming the decision of the Court of Appeal.

APPEAL from a decision of the Court of Appeal affirming a decision of Fry J. granting an injunction against the appellants (1).

The facts are stated in the judgment of the Lord Chancellor.

Feb. 20, 21, 23, 24, 27. *Aston Q.C.* and *John Cutler* for the appellants discussed the evidence at length and contended that the decision of the Court of Appeal upon the facts was wrong. Without disputing any principle of law or equity established by the authorities they cited the following cases, where the Courts had either granted or refused an injunction:—*Singer Manufacturing Co.* v. *Wilson* (2); *Edelsten* v. *Edelsten* (3); *Seixo* v. *Provezende* (4); *Ford* v. *Foster* (5); *Cope* v. *Evans* (6); *Woollam* v. *Ratcliff* (7); *Wotherspoon* v. *Currie* (8); *Farina* v. *Silverlock* (9); *Blackwell* v. *Crabb* (10); and Sebastian's Digest of Trade-mark Cases, pp. 373, 390.

[LORD WATSON:—How can observations of judges upon other and quite different facts bear upon the present case, in which the

(1) 13 Ch. D. 434.
(2) 2 Ch. D. 434.
(3) 1 De G. J. & S. 185.
(4) Law Rep. 1 Ch. 192.
(5) Law Rep. 7 Ch. 611.
(6) Law Rep. 18 Eq. 138.
(7) 1 H. & M. 259.
(8) Law Rep. 5 H. L. 503.
(9) 1 K. & J. 509; 6 De G. M. & G. 214.
(10) 36 L. J. (Ch.) 504.

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only question is what is the result of the evidence? LORD BLACKBURN:—The question to be determined is a question of fact.]

The appellants' counsel also cited the Trade-marks Registration Acts (38 & 39 Vict. c. 91, and 39 & 40 Vict. c. 33) and *Orr Ewing* v. *Registrar of Trade-marks* (1).

Davey Q.C., *H. A. Giffard Q.C.*, and *A. Young* for the respondents, were not heard.

March 6. THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, this case was argued fully by the appellants' counsel on Monday last and on several preceding days, and the time which has elapsed since the arguments has enabled your Lordships very fully to consider them. The result, I believe, is that none of your Lordships think it necessary to call upon the counsel for the respondents.

The plaintiffs, respondents in this case, claim to be entitled to a distinctive label or trade-mark, which they have been in the habit of affixing to the inner wrapper of each bundle of Turkey red twist or yarn exported by them to certain Oriental markets; and which in the 4th paragraph of their statement of claim is described as "of a triangular shape, bearing in green and gold colours the device of two elephants, with a drooping cloth or banner suspended between them, upon which are printed the words 'Prime Turkey red No. 40' (or other number according to the fineness of the yarn):" these—and these only—being alleged by them to be "the essential and distinguishing characteristics thereof." They allege that the defendants (the appellants here) have infringed this trade-mark by exporting to the same markets goods similar (except in quality) with labels similar in shape, colour and appearance, having all the distinguishing characteristics of the plaintiffs' label or ticket, and only colourably different therefrom; and which (as they further say) are calculated to deceive purchasers of the defendants' goods into the erroneous belief that they are purchasing yarn or twist dyed by the plain-

(1) 4 App. Cas. 479.

tiffs. The appeal is brought from a judgment of the Lords Justices affirming a decree of Fry J. in the plaintiffs' favour.

It is in my opinion established by the evidence that the plaintiffs before 1875 had been in the habit of exporting to Bombay, for more than twenty years, Turkey red yarn or twist, with the ticket or label which they claim affixed to the inner (but not to the outer) covering of each bundle or package, and also affixed in a conspicuous manner to the wrappers of the samples intended to be shewn to customers. The goods so ticketed or labelled were consigned to the plaintiffs' agents at Bombay (originally Crawford & Co., afterwards for a long time Graham & Co., and during the last few years Framjee & Co.); other labels being used by them when they sent out goods (of the same quality) in execution of orders from other persons. The trade so carried on by the plaintiffs through these agents was large and valuable. Their yarn or twist was sold in Bombay, partly to dealers by whom it was carried into the interior of a large tract of country and disposed of either to other local dealers or to the ultimate consumers, and partly to weavers resident in Bombay. With all these classes of customers the plaintiffs' article had acquired a high reputation, and commanded a better price than other competing yarns. It was also exported, with the same ticket or label affixed in the same manner, to the plaintiffs' agents at Aden; between which place (and other Red Sea ports) and Bombay there is a close connection: much of the Aden trade being conducted by Parsee or other Bombay merchants.

During the whole time, from the commencement of the use of this ticket or label to 1875, there was no other trade-mark in use either at Bombay or at Aden or (so far as appears from the evidence) anywhere else, having those essential and distinguishing characteristics upon which the plaintiffs rely; viz. the device of two elephants in the upper corners of a green and gold ticket, with a drooping cloth or banner suspended between them and a certain inscription thereon. There appear to have been other trade-marks with inscribed cloths or banners supported by other animals (lions, e.g. or birds) in the upper corners of similar triangular green and gold tickets; but there was no other in which the supporters of the banner were two elephants. Hence it

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happened that many of the customers who desired to purchase the plaintiffs' yarn in Bombay and the markets supplied from thence, were in the habit of knowing it as, and calling it, "*bhé hathi*"; which in the Guzerathi language means "two elephants": sometimes prefixing the word "Graham's" and sometimes "sooneri," which means "golden." It is in my opinion clear upon the evidence that these words "bhé hathi" so used (whether alone or not) had reference to the device upon the plaintiffs' ticket; that they were used to describe the plaintiffs' goods, and those only; and that any customer or native dealer in Bombay or the districts thence supplied, when he asked for "bhé hathi" yarn would be asking for the yarn exported by the plaintiffs and bearing their trade-mark.

It is proper, with a view to the necessary comparison between the plaintiffs' and the defendants' ticket, to add that in the plaintiffs' ticket above the centre of the cloth or banner and between the two elephants there is a crown, which is not claimed in the suit as an essential or distinguishing characteristic of the plaintiffs' ticket, and which has (at all events) not been adopted by the defendants.

The plaintiffs' title to their own trade-mark being clearly made out, the only question is whether the defendants have infringed it?

The defendant, Mr. Johnston, had carried on from 1868 to 1873 business which did not extend to any dealings in yarn. In 1873 he entered into partnership with the other defendant, Nasserwanjee Jamasjee Moolla, a native of Bombay, who had also down to that time no dealings in Turkey red or other yarns. Both defendants before 1875 became acquainted with the character and circumstances of the Bombay and Aden trade in Turkey red yarns, and (among other tickets used in those markets) with the plaintiffs' two-elephant ticket. They exported during the first two years of their partnership to Aden and to Bombay goods described by Moolla as of "a general miscellaneous character," and by Johnston as "Turkey grey, handkerchiefs and scarfs;" not, however, any yarn or twist. Upon the goods which they so exported they affixed a ticket of their own bearing a device called "Gumputty," being the figure of an Indian idol represented as sitting cross-legged with an elephant's trunk. But

according to the view which I take of the evidence it is not shewn that the goods exported by them to either of these markets during those two years, were such either in quantity or in character as to make that Gumputty ticket generally known as a symbol of goods exported by the defendants.

The dealings of the defendants in Turkey red yarn originated in an order from a merchant at Aden, named Abdool Ali Abdool Hoosain, to purchase and ship to him two bales of that commodity of the fineness designated by the number 20; which order was given by a letter dated the 27th of February 1875. It was stated in that letter that the writer had been in the habit of getting this description of goods from Messrs. Dadabhoy & Co. (who were the plaintiffs' agents at Aden); but that the agents of the defendants at that place, Messrs. Brannee & Bhicajee, had informed him that the defendants would supply them on better terms. "As for the ticket on these yarns" (the letter proceeded) "we do not bind you in any way; you may substitute any tickets in place of the Indian goddess and elephants tickets; but please make the tickets of the same colour and equal in size to those of Messrs. Dadabhoy."

I have no doubt that the tickets referred to in this letter as the "elephants tickets," and "those of Messrs. Dadabhoy" were the same, and were the plaintiffs' two elephant-tickets, known by the Guzerati name "bhé hathi" in the Indian and Aden markets. And it is in my opinion a necessary conclusion from the evidence that these expressions would be and were so understood by the defendants; who (as has been said) were already acquainted with the plaintiffs' two-elephant tickets. The "Indian goddess" tickets referred to in the same letter were (no doubt) the Gumputty tickets, which the defendants had been for the two years preceding in the habit of affixing to the miscellaneous goods exported by them.

It was in consequence of the receipt of this order, and for the purpose manifestly of direct competition with the plaintiffs' twist or yarn in the Aden market (the order having been solicited by the defendants' agents from Abdool Ali who had previously been a customer of the plaintiffs' agents) that the ticket or label, now alleged to be an infringement of the plaintiffs' trade-

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mark, was originally devised. The account of its origin given by Mr. Johnston is that having arranged with T. P. Miller & Co. Turkey red dyers at Glasgow, to supply the yarn ordered, the defendants obtained from that firm a green and gold triangular ticket; not the plaintiffs' ticket, and in fact a little larger than it. They then cut out a piece of white paper of the same size and shape, and "stuck in the middle a Gumputty," writing their own names at the bottom. Mr. Johnston then called with it at the office of Messrs. McClure & Macdonald, lithographers and printers, in London; and he says: "They sketched in something or other. The son of one of the partners, I believe, sketched in elephants at the sides." Cross-examined he said: "I can't recollect making any suggestion as to how the ticket should be filled up, but I may have done." I have myself no doubt that he did. McClure & Macdonald (as it happened) were the plaintiffs' engravers; but of this, Mr. Johnston says, he was not then aware. Although the sketch was thus obtained from them, they were not employed to engrave or to print the tickets, which was done by a Glasgow printer named Leggatt. But they were printed from that design.

The ticket thus adopted by the defendants and which they proceeded to affix to the yarn ordered by Abdool Ali and to several other consignments afterwards sent by them to Aden, and also a smaller quantity which they exported in the following year to Bombay (being triangular in shape and printed in gold on a green ground, like the plaintiffs' and many other tickets) has in the centre of the upper part (where the plaintiffs' ticket has a crown) the Gumputty figure, similar to that which the defendants had previously affixed to their own miscellaneous goods, but which had never before been used by them as a trade-mark for Turkéy red yarn. With this figure so placed, it associated two elephants in the two upper corners with a drooping cloth or banner suspended between them, on which were inscribed the words "Prime Turkey red" (with the number) and their own names below, "R. Johnston & Co., London." When this ticket and the plaintiffs' are placed side by side the differences in detail between them are very apparent. The Gumputty in the one occupies the place of the crown in the other. The plaintiffs' name

is inscribed on the cloth or banner in Oriental characters, with "Levenbank" (their place of business) in English characters below. The defendants' name and place of business are inscribed on the cloth or banner in English letters. The cloth or banner itself is larger and fuller in the plaintiffs' label than in that of the defendants, and has an open green space between it and the crown; while in the defendants' ticket the Gumputty rests upon and is in immediate contact with it. The elephants have their heads in the plaintiffs' ticket, and their tails in the defendants', turned outwards; in the plaintiffs' their trunks are turned down, embracing the ends of the cloth or banner; in the defendants' their trunks are turned upwards: in the plaintiffs' they are without howdahs or riders; in the defendants' they have howdahs on their backs with riders in them, who hold up the ends of the cloth or banner.

But although the mere appearance of these two tickets could not lead anyone to mistake one of them for the other, it might easily happen that they might both be taken by natives of Aden or of India unable to read and understand the English language, as equally symbolical of the plaintiffs' goods. To such persons, or at least to many of them, even if they took notice of the differences between the two labels, it might probably appear that these were only differences of ornamentation, posture, and other accessories, leaving the distinctive and characteristic symbol substantially unchanged. Such variations might not unreasonably be supposed to have been made by the owners of the plaintiffs' trade-mark themselves for reasons of their own; especially as it was a common practice in those markets for the same traders (the plaintiffs among others) to affix to their inner packages, sometimes one form of mark, and sometimes another, for reasons more material to themselves than to the ultimate consumer. In the Glenfield Starch Case, *Wotherspoon* v. *Currie* (1), the difference between the two labels was very obvious to the eye, even upon the most cursory inspection: and they were both intended for markets where the English language (in which they were throughout written) was understood. But the use of the characteristic word "Glenfield" was enough for the purposes of deception;

(1) Law Rep. 5 H. L. 508.

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and here the use of two elephants in the upper corners, with an inscribed cloth or banner depending between them, was in my judgment enough for the same purpose. It is true that deception in fact is not in this case proved; but there is a large body of trustworthy evidence to the effect that such deception would be liable, and very likely, to occur, at all events with the more ignorant class of consumers, particularly in the up-country districts; and with this evidence my own judgment concurs. Nor am I able to conceive any satisfactory explanation, under all the circumstances of this case, of the adoption by the defendants of that particular device—two elephants at the upper corners of the ticket with a cloth or banner suspended between them—knowing as they did the plaintiffs' ticket, knowing also the character and circumstances of the markets, and entering as they did upon this particular branch of trade with the direct object of competing with and underselling the plaintiffs, unless it was because they had a desire and intention to approach to the plaintiffs' trade-mark as nearly as they possibly could. For such desire and intention no motive can be suggested, except that of getting some part of the benefit of the goodwill and reputation of the plaintiffs' trade.

Reliance was placed by the defendants' counsel upon the differences between the marks on the outer wrappers of the plaintiffs' and the defendants' goods. But these outer wrappers may in my opinion be disregarded. The name "bhé hathi" by which the plaintiffs' goods were known, was derived from the inner and not from the outer label; and the samples which would be exhibited to customers bore on their wrappers the inner label and not the outer.

I do not think it at all necessary for the purposes of the present case to enter into any inquiry as to the extent to which, or the period during which, certain square labels of John Orr Ewing & Co., on which two elephants standing together with their trunks interlaced are represented, may have been used as tickets for Turkey red yarn in the Bombay or in any other markets. They do not appear to have been at any time sufficiently known to prevent the name "bhé hathi" from being understood in those markets as distinctive of the plaintiffs' goods; and for some years

their use there seems to have been discontinued. The same design was adapted to the triangular green and gold form of label, for use at Penang in 1868. Another triangular label, with two elephants standing and a palm-tree between them, was used on goods exported to Aden by a firm named Wright Newson & Co. on a single occasion only, in 1874.

Of the other labels put in evidence, as having been used by persons not parties to this suit, some have a single elephant, and some two elephants' heads; but none, except those (already mentioned) of John Orr Ewing & Co., and Wright Newson & Co., bear any device to which the description "bhé hathi" or "Two Elephants" would have been appropriate. None of all these different labels (whether lawfully used or not, and whether with or without two elephants) can possibly be regarded as copies or colourable imitations of that particular combination of two elephants with the cloth or banner suspended between them, which (and which alone) is claimed by the plaintiffs in this suit as an essential and characteristic feature of their trade-mark.

Your Lordships are not called upon to decide whether a ticket, which was a rightful and bonâ fide trade-mark of the trader using it, could be excluded by injunction from particular markets (though unimpeachable everywhere else) merely because in those markets it might be liable to be called by a name which the mark of another trader had already acquired there. To that proposition I should not myself, as at present advised, be prepared to assent. But the respondents have agreed to the omission from the injunction granted in this case of the only words which might possibly have been thought to give countenance to such a proposition; though I do not think they were so intended. The injunction, as it will stand when those words are omitted, is in my judgment a necessary result of the application to the circumstances of this case of principles beyond controversy; which were applied, under circumstances more or less similar, by this House in *Wotherspoon* v. *Currie* (1) and by Lord Westbury in *Edelsten* v. *Edelsten* (2).

I am therefore of opinion that the present appeal must be dismissed with costs.

(1) Law Rep. 5 H. L. 508.

(2) 1 De G. J. & S. 185.

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LORD BLACKBURN :—

My Lords, I am of the same opinion. I do not think it necessary, after what has been said, to read any part of the evidence in this case. It is proved—and I believe indeed it was not disputed—that since, I think, the year 1850 down to the commencement of this action, the plaintiffs had used the label marked A to distinguish the yarns of their manufacture sent by themselves to their own agents. And there is overwhelming evidence that this label had become well known in all the Eastern markets as designating such goods, and that the plaintiffs had acquired such a reputation that a higher price was paid for yarn with this trade-mark than for others perhaps quite as good, but not having the advantage of being guaranteed by the plaintiffs' reputation. And there is overwhelming evidence that such yarns had come to be known and asked for in those Eastern markets as "two-elephant" yarns, or some other similar name, which I consider important as evidence that the two elephants were, in the minds of the purchasers, the characteristic feature, or at least a very characteristic feature, of this trade-mark. The defendants have tried but totally failed to prove that anyone else had ever used any trade-mark for yarns with two elephants on it at all; certainly not to such an extent as to be known in any of those Eastern markets.

All this was known to the defendants when in the year 1875 they for the first time used the label B. This was before the first of the Trades-mark Registration Acts was passed, and this action was commenced before either of those Acts came into operation, so that this case must be decided on what was the common law, without any reference to those Acts. Trade-marks have sometimes been likened to letters patent and sometimes to copyrights, from both of which they differ in many respects. And I think, to borrow a phrase used by Lord Ellenborough in *Waring* v. *Cox* (1), with reference to a different branch of the law, "Much confusion has arisen from similitudinary reasoning on the subject."

I think the true guide is given by Lord Kingsdown in the *Leather Cloth Company* (*Limited*) v. *American Leather Cloth Com-*

(1) 1 Camp. 369.

pany (Limited) (1), where he says: "The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader; and he cannot therefore (in the language of Lord Langdale in the case of *Perry* v. *Truefit* (2)) 'be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.'" Then he proceeds to say what he thinks any person is at perfect liberty to do, and adds, speaking of the particular case (3), "On the other hand they had no right directly or indirectly to represent that the article which they sold was manufactured by Crocketts or by any person to whom Crocketts had assigned their business or their rights. They had no right to do this, either by positive statement or by adopting the trade-mark of Crocketts & Co. or of the plaintiffs to whom Crocketts had assigned it, or by using a trade-mark so nearly resembling that of the plaintiffs as to be calculated to mislead incautious purchasers. These being, as I conceive, the rights of the defendants and the limit of those rights, what is it that they have actually done? and in what respect have they infringed the rights of the plaintiffs? That depends upon the question how far the defendants' trade-mark bears such a resemblance to that of the plaintiffs' as to be calculated to mislead incautious purchasers." That, I apprehend, is precisely the question which is to be asked here. In the case from which I have been citing that question was answered in favour of the defendants, in the present case I think it must be answered in favour of the plaintiffs.

If the plaintiffs had proved that purchasers had actually been deceived by the use of the mark B and that the defendants after being told of this had persisted in using this mark B, the plaintiffs would surely have been entitled to an injunction to prevent the continued use of B; and it could be no answer that the purchasers, so deceived, were incautious; the loss to the plaintiffs of the custom of an incautious purchaser is as great a damage as the loss of that of a cautious one. But in this case the plaintiffs judged it necessary to proceed without waiting till actual deceit was proved, and I think they judged rightly, for as James L.J.

(1) 11 H. L. C. 538. (2) 6 Beav. 66, 73.
(3) 11 H. L. C. at p. 539.

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said (1), "the very life of a trade-mark depends upon the promptitude with which it is vindicated;" and having done so they have to satisfy the Court that the similarity between the two tickets was such as to be calculated to mislead purchasers; and no doubt in deciding this (which is a question of fact) every difference between the one ticket and the other is to be considered. There were differences and there were resemblances between the two tickets. The use of the Gumputty or idol instead of the crown is a marked difference. The two elephants in B are mounted and their heads are turned in a different direction from those in A, and their trunks are elevated. Those are differences which might prevent purchasers from being deceived. I do not think they are such as to prevent its being likely that they would be deceived, and there is much evidence, which would have been admissible against any one, to prove that such a ticket as B was likely to mislead.

But as against these defendants their own conduct is evidence; and I think their own conduct is such as to prove against them that the resemblance was calculated to deceive. The defendants were quite aware of what was the plaintiffs' trade-mark and what was the view of it taken by the Eastern buyers. They were sending out yarns which they had never dealt in before, for the express purpose of competing with the plaintiffs, and that they had a perfect right to do; and they had a right to try to persuade the native buyers that their goods which were cheaper than the plaintiffs' were as good or better than the plaintiffs'; but they had no right to do anything which might lead buyers to think their goods were the plaintiffs' so as to get the benefit of the plaintiffs' reputation. Why then did they come so near the plaintiffs' ticket? why use the two elephants at all, unless in the hope that incautious purchasers might mistake one ticket for the other? The defendants were both called as witnesses and had every opportunity given them to explain this, and neither could give any answer. Their counsel argued that the plaintiffs had no monopoly of elephants, and that their clients had a right to use them. So they had, unless they used them so as to mislead or at least be likely to mislead purchasers as to whose the goods were. And

(1) 13 Ch. D. 464.

they complained that to use this as evidence of an intention to mislead, and what I think is more the true question, as evidence of what the effect of the similarity was likely to be, was to rely on topics of prejudice; and that the differences between the two tickets were so great that the defendants could not intend to mislead. I think that the differences were so great that the defendants hoped that no Court would say that the use of the elephants could mislead. In that they have been mistaken. I certainly think that as against these defendants this is very strong evidence, and I do not think any hardship is inflicted on honest traders by holding that if they do not take pains when making a new trade-mark to make it quite unlike an established one, they do so at the peril of making evidence against themselves. I wish expressly to say "evidence," for I do not think it is a proposition of law.

I quite agree in the propriety of altering the injunction in the manner proposed, which I think was requested by the counsel on both sides.

LORD WATSON:—

My Lords, I also am of opinion that the judgment under appeal ought to be affirmed. [After stating the effect of the evidence as to the trade carried on by the appellants and respondents, the user of their respective tickets, and the resemblances and differences between the tickets, his Lordship proceeded:—]

Apart from all questions as to the bona fides or mala fides of the appellants, I am disposed to hold that the circumstances to which I have already adverted afford sufficient grounds for an injunction against the appellants. When a prominent and substantial part of a long and well known trade-mark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of the new trade-mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade-mark belongs. The probability of that result is in this case enhanced by the circumstance that all Turkey red yarns exported from this country are sold in packages which, in size shape and colour, have the closest resemblance to each other. The repro-

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duction of a prominent part of another merchant's trade-mark upon a new ticket does not per se establish that the latter was prepared by its owner with a view to deceive, by himself selling, or by enabling others to sell, his goods as the manufacture of that other merchant. But no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade-mark as will enable any dishonest trader, into whose hands his own goods may come, to sell them as the goods of his rival.

There is a great deal of evidence in this case bearing upon the possibility and probability of the use of the ticket complained of leading to the appellants' yarn being sold as the manufacture of the respondents. It is no doubt evidence of opinion, but the opinion of persons more or less conversant with the trade in Turkey red yarn carried on in the markets of Bombay and Aden; and these observations apply to the witnesses adduced on both sides. I think the weight of that testimony is to the effect that yarns bearing the appellants' trade-mark would be occasionally, and might be frequently sold to consumers of Turkey red yarn, as of the respondents' manufacture, to the detriment of the respondents. [After stating some of the evidence on this point his Lordship proceeded:—]

There are other circumstances in the present case which in my opinion establish beyond question the respondents' right to have an injunction against the continued user of the appellants' new trade-mark. The appellants did not make the two elephants and banner a part of their device through inadvertence. They were familiar with the respondents' "two-elephant" trade-mark; and they knew in 1875 that they were entering into direct competition with the respondents in markets where Turkey red yarns of the respondents' manufacture, distinguished by that trade-mark, had been long and favourably known. Nothing could be more legitimate than such competition, if prosecuted by legitimate means; but I am of opinion that, having regard to what they knew about the trade and trade-mark of the respondents, it was eminently the duty of the appellants, in adopting a ticket of their own, to avoid every feature of the older trade-mark which could by possibility create the risk of their yarns being sold, by some

interested and unscrupulous dealer, as the respondents'. And failure in that duty will necessarily give rise to inferences unfavourable to the honesty of their intentions, unless the owners of the new ticket can and do give some reasonable explanation of their conduct.

The statements made by the appellants in explanation and justification of their conduct, after their ticket was challenged, and before issue of the writ of summons, were, to say the least, uncandid: and the depositions of the two partners appear to me to exhibit a degree of reticence which does not admit of a favourable construction. [After stating the evidence on this point his Lordship proceeded:—]

I regret my inability, even upon their own evidence, to come to the conclusion that the appellants had any innocent or honest purpose to serve in making these two elephants part of the device on their ticket. I do not wish to suggest that they deliberately copied the respondents' trade-mark, with the intention of themselves selling their yarns as the respondents'; but I do think that, in designing their own trade-mark, they did expect to derive some commercial advantage from the use of the two animals which also appeared on the respondents' ticket, because of their association with that ticket: they at the same time, having a vague, though it might be a sincere belief, that in the event of challenge they would be able to justify what they had done, either on the ground that one or more elephants on Turkey red tickets were common property, or on the ground that they had sufficiently distinguished their own from the respondents' ticket by the substitution of a "Gumputty" for a crown. Both these defences have failed; and the necessary consequence in my opinion is that the appellants cannot escape the imputation of having acted from motives not altogether consistent with fair mercantile dealing, and must submit to the injunction which has been granted by the Courts below, subject to the modification which your Lordships have proposed.

Order appealed from varied by declaring that the words (1) "*and from employing any mark or*

(1) The terms of the injunction appealed from are given in the report 13 Ch. D. 450. The injunction as varied by the House stood as follows:—

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words which would be calculated to cause any Turkey red yarn not dyed by the plaintiffs to be known in Bombay as Bhé hathi, or Do hathi yarn," ought to be omitted from the injunction granted by Fry J. on the 15th of March 1879, *and that instead of the words "or to represent," which follow thereupon, the words "or so as to represent" ought to be substituted: Order appealed from in all other respects affirmed with costs: Cause remitted to the Chancery Division.*

Lords' Journals, 6th March, 1882.

Solicitors for appellants: *Hindson, Miller, & Vernon.*
Solicitors for respondents: *Phelps, Sidgwick, & Biddle.*

"To restrain the defendants Robert Johnston & Co., their servants workmen and agents, from affixing or causing to be affixed to any Turkey red yarn not dyed by the plaintiffs Archibald Orr Ewing & Co. the ticket marked B, and from using two elephants on any ticket used on Turkey red yarn, without clearly distinguishing such ticket from the plaintiffs' ticket mentioned in the pleadings, being the exhibit marked A referred to in the said depositions, or so as to represent or induce the belief that any of the said yarn was dyed by the plaintiffs:" with an order for an account of profits and costs.

[HOUSE OF LORDS.]

THOMAS PUGH AND WILLIAM CADMORE APPELLANTS;

AND

CHARLES HARBORD HEATH AND JOHN GUDGEON NELSON . . . . . } RESPONDENTS.

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Limitations, Statutes of (3 & 4 *Will.* 4 c. 27 *ss.* 2, 3, 24, 34; 1 *Vict. c.* 28)—*Action to recover Land—Mortgage—Foreclosure—Ejectment—Judicature Acts* 1873 *ss.* 24, 25.

A legal mortgage of freehold land in 1856; no possession by the mortgagee, and no payment of principal or interest to him, nor any acknowledgment of his title. In 1870 a bill by the mortgagee for redemption or foreclosure; in 1874 a decree nisi for redemption or foreclosure; and in 1877 an order absolute for foreclosure. In 1878 an action by the mortgagee to recover possession of the land:—

Held, affirming the judgment of the Court of Appeal, that although brought more than twenty years after the date of the mortgage deed the action was not barred by the Statutes of Limitations (3 & 4 Will. 4 c. 27 and 1 Vict. c. 28).

Semble, per EARL CAIRNS, that the action, being brought by one who had become absolute owner of the land under the foreclosure decree, was an action as to which the right to bring it must be taken to have accrued within s. 2 of 3 & 4 Will. 4 c. 27 at the date of that decree; and that s. 3 of that Act in defining when the right shall be deemed to have accrued is not necessarily exhaustive, or otherwise inconsistent with this view.

APPEAL from a judgment of the Court of Appeal (15th January 1881) in favour of the plaintiffs, reversing a judgment of the Common Pleas Division (3rd March 1880) in favour of the defendants.

The facts are stated in the report of the case below (1). For the present purpose they appear sufficiently from the headnote and from the judgment of Earl Cairns.

Feb. 28. *Cohen* Q.C. and *W. F. Robinson* Q.C. (*Trevelyan* with them) for the appellants. This action is barred by 3 & 4 Will. 4 c. 27, having been brought more than twenty years after the right accrued within ss. 2 and 3.

[*H. A. Giffard* Q.C. for the respondents admitted that there was

(1) 6 Q. B. D. 345.

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no legal evidence of the payment of principal or interest upon the mortgage debt, and that the statute began to run from the date of the mortgage deed in 1856.]

The statute having once begun to run nothing could stop it except the events mentioned in the statute, and here they did not happen. Merely bringing ejectment does not prevent the statute from running: *Bampton* v. *Birchall* (1); nor even judgment in ejectment without possession: *Thorp* v. *Facey* (2). The suit for foreclosure was not "an action to recover land" within s. 2, or within the Rules of Court, 1875, Order XVII., r. 2: *Tawell* v. *Slate Co.* (3). Before the Judicature Acts a Court of Equity never assisted a mortgagee to get possession, but left him to his remedy at law. A foreclosure decree does not affect possession at all: *Paget* v. *Ede* (4). A mortgagee who has the legal estate cannot have a receiver: *Berney* v. *Sewell* (5). The plaintiffs might have brought ejectment at any time after the date of the mortgage, and it is their own laches that they did not. The foreclosure decree gave the plaintiffs no new right. The statute would bar the action as against the mortgagor, and as against the appellants who are purchasers from the mortgagor without notice of the mortgage the case is stronger: the Lords Justices refused to order a sale or to require the purchasers to give up the title deeds: *Heath* v. *Crealock* (6).

[They also referred to *Colyer* v. *Finch* (7); *Wrixon* v. *Vize* (8); *Casborne* v. *Scarfe* (9); *Harlock* v. *Ashberry* (10).]

Davey Q.C. *H. A. Giffard* Q.C. and *Muir Mackenzie* for the respondents were not called on, Earl Cairns saying that if the House desired to hear them notice would be given.

March 28. EARL CAIRNS:—

My Lords, at the end of the argument for the appellants in this case your Lordships desired the case to be adjourned, in

(1) 5 Beav. 67, 74.
(2) 35 L. J. (C.P.) 349.
(3) 3 Ch. D. 629.
(4) Law Rep. 18 Eq. 118.
(5) 1 Jac. & W. 647.
(6) Law Rep. 10 Ch. 22, 32.
(7) 5 H. L. C. 905, 915, 920.
(8) 3 D. & War. 104, 120, 123.
(9) 1 Atk. 603; 2 Tu. L. C. 1055, 5th Ed.; 2 Jac. & W. 194; 1 West, temp. Hardwicke, 221.
(10) 19 Ch. D. 539.

order that you might consider how far they had shewn any reason to impeach the judgment of the Court of Appeal. I am now prepared for myself (and I understand that your Lordships take the same view) to say that I am satisfied that the judgment appealed against is correct, and that the appeal must be dismissed.

I concur so fully in the reasoning of the Lord Chancellor in delivering the judgment of the Court of Appeal that I propose to add but little to it. The case may be stripped of many facts which in the result are immaterial, and may be looked at thus.

A legal mortgage of freehold land in 1856; no possession by the mortgagee; and no payment of principal or interest to him; nor any acknowledgment of his title. Then in 1870, that is after fourteen years, the mortgagee files a bill for foreclosure. He obtains a decree nisi in 1874, and a decree absolute in 1877. Then in 1878 he brings the present action, under that decree, to recover possession of the land. The appellants allege that the action is barred by the Statute of Limitations. Is this so?

It was scarcely contended in the argument of the appellants, and I do not think it could have been contended, that if instead of a legal mortgage the mortgagee had only had an equitable mortgage or charge, and had within twenty years brought a suit of foreclosure and obtained a decree, he would not have been entitled to do so, and to hold and enforce that decree for twenty years by every process which a Court of Equity could give. The Court is now not a Court of Law or a Court of Equity; it is a Court of complete jurisdiction; and if there were a variance between what, before the Judicature Act, a Court of Law and a Court of Equity would have done, the rule of the Court of Equity must now prevail. The argument of the appellants must therefore be that the possession of a legal mortgage, passing the legal estate as a pledge, put the mortgagee in a worse position than if he had not got it, and exposed him to the risk, as soon as twenty years from the date of the legal mortgage had expired, of forfeiting and losing the benefit of the suit and proceedings which he had in the meantime properly taken in the proper Court to have himself adjudged, by reason of the default of the mortgagor, the absolute owner of the land. This is an argument which appears

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to me to be as repugnant to reason as to justice, and I think moreover that your Lordships could not admit it without acting in direct opposition to the spirit and principle of the case before Lord St. Leonards of *Wrixon* v. *Vize* (1) which has long been a governing authority on this subject. Lord St. Leonards in that case, besides the observations cited from his judgment by the Lord Chancellor in the Court of Appeal, makes this remark with with reference to sect. 24 of 3 & 4 Will. 4 c. 27, "The 24th section is not well framed, for .... it would apply only to an equitable mortgagee, and give him the same right in equity as he would have had at law if he were a legal mortgagee; but it is impossible to suppose that where a mortgagee is entitled to relief in equity, he was not still to have the right within the time appointed, *although he had a legal estate*" (2).

These observations, coupled with the more extended reasoning of the Court below, would be sufficient to dispose of the case. But I must add that if it were necessary I should have little doubt that the present action, being not an action of ejectment by a legal mortgagee to put himself in possession of land which he is to hold as a pledge subject to account and to all the infirmities of a mortgagee's title, but being an action by one who has become absolute owner of the land under a decree of the Court, is an action as to which the right to bring it must be taken to have accrued, within the meaning of sect. 2 of 3 & 4 Will. 4 c. 27, at the date of that decree of the Court, and that sect. 3 of that Act, in defining when the right shall be deemed to have accrued, is not necessarily exhaustive or otherwise inconsistent with this view.

I therefore have to move your Lordships that the appeal be dismissed with costs.

LORD O'HAGAN:—

My Lords, I am quite of the same opinion, and I think it unnecessary to add anything to what has been said. I have a very high respect for the learned Judges who decided this case in the Common Pleas Division; but I am wholly unable, after looking carefully into their judgments, to discover the principles upon

(1) 3 D. & War. 123. (2) 3 D. & War. 118.

which they are founded, or the authority by which they are sustained. The judgment which was pronounced by the Lord Chancellor in the Court of Appeal appears to me to have completely exhausted the case. He has gone through all the authorities which I can find bearing upon the matter, and I shall not discuss them further. The decree absolute gave a new right, confirmed a new estate, and thereby, as it appears to me, absolutely barred the Statute of Limitations.

Upon these grounds I think that the appeal ought to be dismissed.

LORD BLACKBURN :—

My Lords, I entirely concur. Some twenty years ago there might have been some difficulty, in this case, in saying whether the proper form of remedy was by ejectment at law or by a suit in Chancery; but now it is quite immaterial which of the two it is, if it can be shewn that there is a remedy, and I perfectly concur in the judgment, for the reasons which have been given by the noble and learned Lord now on the woolsack, that there is a remedy in one way or the other, and it does not matter which.

LORD WATSON :—

My Lords, I also entirely concur, and for the same reasons.

Judgment appealed against affirmed; and appeal dismissed with costs.

Lords' Journals 28th March 1882.

Solicitors for Appellants: *Combe & Wainwright.*

Solicitors for Respondents: *Talbot & Tasker*, agents for *Budd, Son, & Brodie.*

[HOUSE OF LORDS.]

H. L. (E.) 1882 May 22.

RICHARD WILLIAM ENRAGHT, CLERK . APPELLANT;

AND

LORD PENZANCE AND JOHN PERKINS . RESPONDENTS.

Public Worship Regulation Act 1874 (37 & 38 *Vict. c.* 85)—*Vestments—Biretta—Stole—Monition—Inhibition—Jurisdiction—Prohibition.*

A monition, precisely following a judgment pronounced by the judge under the Public Worship Regulation Act 1874, admonished a clerk to abstain for the future when officiating in his church from doing each of certain specified acts, and (amongst them) from wearing the vestments known as an albe, a chasuble, and a biretta; and from causing to be formed a procession at the commencement of Morning Service; and also "from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth or any of them, or from unlawfully permitting the same or any of them."

A subsequent inhibition, after reciting the monition and the disobedience of the clerk thereto in regard to several other matters, recited his disobedience in permitting his curate to wear a vestment known as a biretta and a vestment known as a stole, and also in permitting his curate to form a procession between Morning Prayer and the Communion Service, and for such his disobedience inhibited the clerk from performing services for three months and until relaxation. The clerk having applied for a writ of prohibition:—

Held (affirming the decision of the Court of Appeal) that the judge had jurisdiction (subject to correction on appeal) to insert the alia similia clause in the monition.

And that under sect. 13 of the Public Worship Regulation Act 1874 the judge had jurisdiction to determine whether the wearing of a stole, and the forming a procession between Morning Prayer and the Communion Service were practices, acts, matters and things of the same or a like nature to those particularly set forth in the monition; and that if he had determined that question wrongly it might be the subject of appeal—if an appeal lies—but could not afford any ground for prohibition.

And that even if the wearing of a stole and the forming a procession between Morning Prayer and the Communion Service were not breaches of the monition, yet as it appeared on the face of the inhibition that the clerk had committed several other acts of disobedience any one of which would have justified an inhibition for the full period, there was no excess of jurisdiction and no ground for prohibition.

APPEAL only from so much of an order of the Court of Appeal as refused a writ of prohibition to prohibit Lord Penzance from further proceeding on the monition or inhibition obtained in the

matter of a representation under the Public Worship Regulation Act 1874.

The decision of the Court of Appeal on the matters involved in the present appeal appears in the report of *Enraght's Case* below (1). The facts are stated in the judgment of Lord Blackburn in this House.

April 27, 28. *Arthur Charles* Q.C. and Dr. *Phillimore* (*Poland* and *Beaufort* with them) for the appellant:—

The inhibition being founded partly on the wearing of the stole and the procession between Morning Prayer and the Communion Service was in excess of jurisdiction and is therefore matter for prohibition. Besides inhibiting for what was within the jurisdiction—the biretta and the procession before Morning Service—the Judge inhibited for what was not and imposed the maximum penalty for all. The alia similia clause in the monition meant only a colourable imitation of the forbidden articles, that is the same thing with a variety. The judge has not adjudicated that the wearing a stole and the procession between Morning Prayer and the Communion Service are illegal, or as a matter of fact that they were within the alia similia clause. Those matters not being part of the representation under the Act, the appellant had no opportunity of arguing that they were lawful. It is impossible to say how much penalty was attached to each offence and the inhibition is therefore invalid: *O'Connell* v. *Reg.* (2); *In re Pollard* (3); *Campbell* v. *Reg* (4). The judge has no authority except what is given him by the Public Worship Regulation Act 1874 (37 & 38 Vict. c. 85) and must pursue that authority strictly and shew jurisdiction on the face of his orders: *Christie* v. *Unwin* (5); *Harrison* v. *Wright* (6); *Bartlett* v. *Kirwood* (7). It is a question whether an appeal lies against an inhibition—per James L.J. (8) —but whether it does or not prohibition lies: *Mayor of London* v. *Cox* (9); *Burder* v. *Veley* (10); *Bishop of Chichester* v. *Har-*

(1) 6 Q. B. D. at pp. 378, 451, 452, 460, 461, 468, 469.
(2) 11 Cl. & F. 155.
(3) Law Rep. 2 P. C. 106.
(4) 11 Q. B. 813.
(5) 11 A. & E. 373.
(6) 13 M. & W. 816.
(7) 2 E. & B. 771.
(8) 6 Q. B. D. 452.
(9) Law Rep. 2 H. L. 269, 270.
(10) 12 A. & E. 300.

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ward (1). As to the nature of albe, chasuble, biretta and stole see *Elphinstone* v. *Purchas* (2). The monition was void because it contained the alia similia clause which was in excess of jurisdiction: *Groome* v. *Forrester* (3); *Reg.* v. *Barton* (4). There is no precedent for such a clause: Coote's Eccl. Pract. p. 255; no form of monition can be found with such a clause: see the note by the reporter to *Newbery* v. *Goodwin* (5). In all cases of vestments the specific vestment has been and must be charged. There was no alia similia clause in *Sumner* v. *Wix* (6); *Wyndham* v. *Cole* (7); *Serjeant* v. *Dale* (8); or *Clifton* v. *Ridsdale* (9); and see the Rules and Forms made under sect. 19 of the Act (10). The intention of sect. 18 of the Act was to give protection; but the result of what has happened is that the appellant may be proceeded against under the Church Discipline Act (3 & 4 Vict. c. 86) for wearing the stole, because there has been no judgment against him as to the stole.

Sir *F. Herschell* S.G. (Sir *H. James* A.G. and *A. L. Smith* with him) for Lord Penzance.

Wills Q.C. (*Jeune* with him) for the respondent Perkins.

Their arguments sufficiently appear from the judgments.

For precedents of admonitions in general terms they cited *Cox* v. *Goodday* (11); *Hoile* v. *Scales* (12); *Jarman* v. *Bagster* (13); *Taylor* v. *Morley* (14); *Burder* v. *Langley* (15); *Dean of York's Case* in 1864, not reported, but cited from an extract from the Registry of the Chancery Court of *York*. They also referred to *Barnes* v. *Shore* (16); *R.* v. *Payton* (17); *Martin* v. *Mackonochie* (18); Coote's Eccl. Practice, pp. 254, 255.

(1) 1 T. R. 650.
(2) Law Rep. 3 A. & E. 81, 94.
(3) 5 M. & S. 314.
(4) 13 Q. B. 389.
(5) 1 Phill. Eccl. 282, 286.
(6) Law Rep. 3 A. & E. 58.
(7) 1 P. D. 130.
(8) 2 Q. B. D. 558.
(9) 1 P. D. 363, 383.
(10) 4 P. D. 267.
(11) 2 Consist. Rep. 138.
(12) 2 Hagg. Eccl. 566.
(13) 3 Hagg. Eccl. 360.
(14) 1 Curt. 470.
(15) No. Ca. Eccl. & Mar. p. 452.
(16) 1 Roberts. 382.
(17) 7 T. R. 153.
(18) 4 Q. B. D. 786.

Arthur Charles Q.C. in reply:—

Cox v. *Goodday* (1), *Hoile* v. *Scales* (2), and *Jarman* v. *Bagster* (3), were cases of brawling, not vestments. The complainant must choose his unlawful vestment or charge all unlawful vestments. This complaint charges only one, and as to that only can the judge adjudicate, admonish and inhibit. The appellant cannot obtain relaxation from the inhibition unless he promises to abstain for the future from the matters as to which there was an excess of jurisdiction.

The House took time to consider.

May 22. LORD BLACKBURN:—

My Lords, the appellant in the Queen's Bench Division obtained a rule calling on the respondents respectively, as the Judge under the Public Worship Regulation Act 1874 and the complainant in a representation made under the said Act, to shew cause why a writ of prohibition should not issue to prohibit Lord Penzance "from further proceeding in the matter of the said representation or on the monition or inhibition obtained thereon, the said representation, monition and inhibition being matters in which he had no jurisdiction."

The Queen's Bench Division unanimously discharged this rule with costs, and on appeal the Court of Appeal unanimously affirmed this decision and dismissed the appeal with costs. The judgments in both Courts below are reported in 6 Q. B. D. 377. The present appeal is from the decision of the Court of Appeal. Since that decision this House has decided the case of *Green* v. *Lord Penzance* (4), and it was not disputed at the Bar that the decision in that case disposed of most of the objections taken and argued before the Court of Appeal. The argument therefore was confined to the points not raised and disposed of in *Green* v. *Lord Penzance* (4), and I proceed to state what these are.

The 8th section of the Public Worship Regulation Act 1874 provides that if persons (having qualifications which were possessed by the complainant in this case) shall be of opinion that

(1) 2 Consist. Rep. 138.
(2) 2 Hagg. Eccl. 566.
(3) 3 Hagg. Eccl. 360.
(4) 6 App. Cas. 657.

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any of the things mentioned in the sub-sections in that section have been done, they may represent the same to the bishop of the diocese, by sending to the bishop a form, as in Schedule B to the Act, duly filled up and signed. That form requires that it shall "state the matter to be represented; if more than one, then under separate heads." It gives no further direction, but it is from the nature of the thing proper that the statement should shew with sufficient certainty what it is alleged that the person complained against has done, so that he may be able, if he desires it, to disprove his having done so. And the representation should be confined to those things which it is alleged that he has done, not extending to things which it is anticipated he may in future do.

In the present case the representation alleged under fourteen heads that the appellant had done things alleged to be within the different sub-sections of sect. 8. And it stated with distinctness that each of these were alleged to have been done in the church of the Holy Trinity, being the church of the said parish, and the times when each was done. And the second head alleged that the appellant had, "in the administration of the Holy Communion, worn certain unlawful ecclesiastical vestments other than and besides or instead of those appointed and allowed by law, to wit a vestment known as an albe, a vestment known as a chasuble, and a vestment known as a biretta; and by having at the said midday service on the 24th day of November 1878, and at the said midday service on the 9th day of February 1879, unlawfully permitted a curate or assistant minister when officiating in your said church in the Communion Service and in the administration of the Communion unlawfully to wear certain unlawful ecclesiastical vestments, to wit a vestment known as an albe, a vestment known as a chasuble, and a vestment known as a biretta."

The 13th head alleged, "and also by having at the midday service commencing at 10·30 A.M., on the 21st day of April 1878, the 29th day of September 1878, and the 6th day of October 1878 respectively, in your said church immediately before but at the hour appointed for the commencement of the prayers appointed to be read at Morning Service, and without any break or interval, and as connected with and being the beginning of and a part of

the rites and ceremonies of public worship on the said several occasions, and in the presence of the congregation assembled for such services, unlawfully caused to be formed a procession consisting of the choir and an 'acolyte' in a black cassock and white cotta, and which procession, with three banners and a processional cross carried therewith, proceeded from the vestry at the east end of the south side of the church down the south aisle, and afterwards up the nave of the church to the choir stalls, the choir singing a hymn during the said procession."

The representation was sent to the Bishop of Worcester, the bishop of the diocese, who transmitted it to the Archbishop of the province, who required Lord Penzance, as judge, to hear the matter of the representation. Due notice was given to the appellant, who did not make any answer to the representation, and in default of such answer, by the express provision of sect. 9, "he was deemed to have denied the truth or relevancy of the representation." The appellant did not appear, though due notice had been given to him, and the judge having heard the evidence proceeded, as required by sect. 9, "to pronounce judgment on the matter of the representation."

Up to this point the decision of this House in *Green* v. *Lord Penzance* (1) establishes that everything was rightly and formally done. As the appellant was to be deemed to have denied the truth or relevancy of the representation, which I think means to deny both, the judge had to determine a question of fact on the evidence, viz. whether the representations, or any of them, were true. And he had also to determine a matter of law, viz. whether those representations which he found to be true were relevant; that is whether the allegations were of "unlawful" practices, on which he must be guided by the general ecclesiastical law; and also whether they were such unlawful practices as to come within some of the sub-sections in sect. 8.

The judgment is not printed among the papers brought before this House, but it was produced at the Bar, and is exactly as recited in the monition, which is printed in the appendix. It commences by pronouncing that the complainant had sufficiently proved the allegations contained in the representation, and that

(1) 6 App. Cas. 657.

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the clerk had offended against the statutes, laws, constitutions, and canons of the Church of England in respect of the practices, acts, matters and things alleged in the said representation " to wit by having "—and it then proceeds to repeat each of the statements in the representation, so as to pronounce that he had done those various acts at the time and place and with the particulars alleged. I do not know that such precise particularity in the findings was required, but such are the findings, and at all events no objection can be made to the judgment for not being precise and clear enough. So far if there had been anything wrong, it should be set right on appeal. Then the judge prononounces that such matters, acts and things were respectively a decoration forbidden by law introduced into the said church, unlawful ornaments of the minister of the said church, failures on the part of the incumbent to observe and cause to be observed the directions contained in the Book of Common Prayer relating to the performance in such church of the services, rites and ceremonies ordered by the said book, or unlawful additions to and alterations of such services, rites and ceremonies.

Had this part of the judgment been wrong, and had the judge, misconstruing the statute under which he was acting, held that an act which was not within sect. 8 was, probably it might have been a ground for prohibition. I do not say that it would have been. But this part of the judgment was not impeached. And then the judgment proceeded to declare that it was requisite that the incumbent should be admonished to abstain and refrain for the future, when officiating in his said church, from doing each of those things, " and also from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth or any of them, or from unlawfully permitting the same or any of them." The monition precisely followed the judgment, and contained that clause.

The first objection raised arose on this. The 13th section of the Act provides that obedience to the monition shall be enforced if necessary by an inhibition, which shall not be relaxed until the incumbent shall by writing under his hand in the form in rule 28 " undertake to pay due obedience for the future to such monition, and at all times to observe and do as therein

ordered ; " (1) and it was argued that it was beyond the jurisdiction of the Judge to admonish the incumbent to abstain in future from all practices of the same or of the like nature, and that he could not be required as a condition of the relaxation of an inhibition to undertake to observe a monition containing such an admonition.

In the Court of Appeal James L.J. says that the monition in this respect was " in accordance with the well-established and reasonable practice of the Ecclesiastical Court " (2). And I understand that it had not been contested on the argument before the Court of Appeal that it was the established rule of the Ecclesiastical Courts, where the act charged was an instance of an unlawful practice, that the monition should be to abstain not merely from repeating the particular act, but from the practice itself. It was at your Lordships' Bar denied that such was the established rule. The respondents not having been aware that this was to be denied were not prepared to produce many instances, but they produced several in which it had been done.

The question here is whether the judge had jurisdiction to do this. In *Mackonochie* v. *Lord Penzance* (3) the present Lord Chancellor said, "The Ecclesiastical Law, it must always be remembered, even in those proceedings which are called (and in some sense are) criminal and penal, has for its object not the punishment of individual offenders, but the correction of manners and the discipline of the Church. " Monition " (which is sometimes itself called an ecclesiastical censure) is described in the books as of a " preparatory " nature, i.e. (as I understand the term), as a warning or command, to be followed in case of disobedience by some coercive sanction." Bearing this in mind, I think it is not only, as James L.J. says, " reasonable " but in some cases may be absolutely indispensable, to warn not merely against repeating the particular act, but against repeating the practice. I give no opinion either way as to whether such a warning should or should not have been given in the present case. The question is not before me on appeal, and any opinion on that would be (in the legal sense of the word) impertinent. But I think that your

(1) 4 P. D. 280. (2) 6 Q. B. D. 451.
(3) 6 App. Cas. 424, 433.

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Lordships should hold that it was within the jurisdiction of an ecclesiastical judge (subject to correction on appeal) to determine whether the case was such as to make it requisite to admonish not only against repeating the acts, but against repeating the practices of which those acts were instances.

There is one more point. The Act by sect. 13 provides that obedience by an incumbent to a monition shall be enforced if necessary by an order inhibiting the incumbent from performing any service of the Church, or otherwise exercising the cure of souls within the diocese, for a term not exceeding three months; and at the expiration of the term inhibition is not to be relaxed until the incumbent undertakes in writing to pay due obedience to the monition. And it is further provided that any question as to whether a monition issued after proceedings before a judge has or has not been obeyed shall be determined by the judge.

It having been formally alleged that the monition had been disobeyed, and the appellant having had notice of the intention to move for an inhibition and of what were the allegations relied on, and a full opportunity of appearing and denying the allegations, and not choosing to appear, the allegations were proved, and the Judge made an order inhibiting him for three months, and "thereafter until the inhibition shall have been duly relaxed." The order is printed in the appendix. It begins by reciting the monition and then proceeds: "And whereas it has been made to appear before us that the said monition was duly served on the said Rev. Richard William Enraght on the 30th day of August 1879, but that he has failed to pay due obedience to the said monition in regard to the following matters, that is to say, by having . . ." It then proceeds to find that the incumbent had in person repeated at times after the service of the monition five of the matters which in the representation he had been charged with having done, and which he had been specifically admonished not to repeat. It then proceeds "And also by having permitted the Rev. Warwick Elwin or other his curate or assistant minister whilst officiating at the Communion Service at the mid-day service, and the celebration of the Holy Communion which took place thereat in the said church, commencing at 10.30 A.M. on Sunday the 16th day of November 1879 aforesaid, to wear certain

unlawful ecclesiastical vestments, to wit a vestment known as a biretta, and a vestment known as a stole; and also by having at the said service permitted his said curate at the said service to"— do several acts which were specifically mentioned in the representation, and which the incumbent had been specifically admonished not to repeat; "and also by having suffered and permitted his said curate in the said service, between the conclusion of the prayer appointed to be read for Morning Service and the celebration of the Holy Communion, and as connected with and being part of the rites and ceremonies of public worship, and in the presence of the congregation assembled for such worship, unlawfully to cause to be formed a procession consisting of acolytes some of whom were dressed in blue and others in black cassocks, and all of whom wore white cottas, with a processional cross and several banners, and of the clergy wearing coloured stoles, cottas and birettas, to proceed from the vestry down the south aisle and up the nave of the church to the choir stalls. . . . We do therefore humbly order that for such his disobedience he, the said Reverend Richard William Enraght, be inhibited for the term of three months from the time of the publication of this inhibition and thereafter until the same shall have been duly relaxed. . . ."

Your Lordships will remember that in the passages which I have already read from the monition the unlawful ecclesiastical vestments mentioned are an albe, a chasuble and a biretta, and that a stole is not named at all; and that the procession mentioned in the monition was one at the commencement of Morning Service, and before morning prayer, and not (as in the inhibition) between morning prayer and the Communion Service, and that the latter procession seems to have been more ornate than the earlier one.

On these differences two objections were made, first, that the monition to abstain from all practices "of the same or a like nature, or from unlawfully permitting the same or any of them" could not properly be applied to wearing a different kind of unlawful vestment; nor, secondly, to an unlawful procession at a different period of the service and not identical in its details with the former. The Court of Appeal decided against these objections on the ground that the judge, having to decide whether his monition had been obeyed, had jurisdiction to inquire and determine

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whether what was alleged or proved to be done was a practice of the like nature with what had been shewn by the representation to have been done before and was specifically forbidden. And I think that this was not exactly a question of fact, but of law and fact combined, within the jurisdiction of the judge; and consequently that even if he was wrong in his decision, it would afford no ground for prohibition.

But I think there is a further point even more clearly fatal to the appellant's case. For assuming that it was made out that the two supposed breaches of the monition in permitting the wearing of a stole and permitting this procession were not breaches of the monition, yet it appears clearly on the face of the inhibition that the incumbent had in person committed at least five complete separate acts of disobedience, any one of which would have justified an order to inhibit for the full period of three months. It was argued that the judge might have, and that it ought to be inferred by the prohibiting Court that he had, made the order for the full period of three months on account of the two matters which were not breaches of the monition, and that if they had been away he would not have made an order for so long a period. This I think would probably be an inference contrary to the fact; but it was argued that the decision of this House in *O'Connell* v. *Reg.* (1) compels us to draw that inference. I do not think so. It is true that in that case the judgment was one quite within the competence of the Court to pass, and one which would have been quite unimpeachable if a few words had been inserted on the record to the effect that the sentence was given in respect of each of the offences; which words, since that decision, have always been inserted. And it is also true that on very technical reasoning it was by a narrow majority held that the judgment must be arrested. But that was in a Court of error, and there is no authority that I am aware of for saying that a similar slip in the form of the judgment of an inferior Court would amount to an excess of jurisdiction, and so give a ground for prohibition; and I think it would be a cause of much mischief if it were so held.

I therefore beg to move that the order appealed from be affirmed, and the appeal dismissed with costs.

(1) 11 Cl. & F. 155.

LORD WATSON:—

My Lords, the appellant has failed to satisfy me that he is entitled to have the writ of prohibition which the learned judges of the Queen's Bench Division and of the Court of Appeal declined to grant.

The suit against the appellant was duly instituted before the Official Principal of the Arches Court of Canterbury, under the Public Worship Regulation Act 1874, by representation transmitted from the bishop of the diocese, and it is not matter of controversy that in all subsequent proceedings in the suit the judge of the Arches Court was bound to follow strictly the course of procedure prescribed by the Act, or by the rules framed in terms of it which are of statutory authority. But the statute and the rules do not dictate everything that is to be done in the suit; and they contain a variety of terms, of which no statutory definition is given, borrowed from the technical language of the Ecclesiastical Courts. It must also be kept in view that the jurisdiction created by the Act of 1874 is not conferred upon a newly constituted statutory tribunal, but is vested in a judge who, by the express words of the Act, is declared to be the Dean of the Arches Court, with all the powers and privileges pertaining to that judicial office. It appears to me in these circumstances that, whilst the judge must observe the statute and the rules in all points which these prescribe, he must attach to technical statutory words the meaning which they ordinarily bear in the Ecclesiastical Courts, and must in the absence of any statutory prescription be guided by the practice of that Court.

By his judgment, pronounced upon the 9th of August 1879, Lord Penzance found it proved that the appellant had offended against the laws and canons of the Church, in all the particulars alleged in the representation; one of these being that the appellant had permitted his curate, when officiating in the Communion Service, and in the administration of the Holy Communion, to wear certain unlawful ecclesiastical vestments, to wit a vestment known as an albe, a vestment known as a chasuble and a vestment known as a biretta. Thereafter in pursuance of an order to that effect embodied in the judgment, a monition was on the 29th of August 1879 issued under the seal of the Arches Court, enjoining

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the appellant to abstain for the future from each and all of the specific acts enumerated in the representation and judgment, and also "from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth or any of them, or from unlawfully permitting the same or any of them."

It was argued at your Lordships' Bar, although the point does not seem to have been taken in the courts below, that these general words of admonition are unwarranted either by the provisions of the Public Worship Regulation Act, or by the practice of the Ecclesiastical Courts. Neither of these propositions appears to me to be well founded. The Public Worship Regulation Act expressly authorizes the issue of a monition, but the statute and the rules are alike silent as to the precise character of the particulars which are to be inserted therein. These are matters in which, according to my apprehension, the judge is left at liberty to follow the ordinary procedure of his Court. It is obvious that a monition not containing an injunction to abstain from alia similia might be substantially disobeyed otherwise than by a mere repetition of the identical acts found to be proved by the judgment; and the appellant's counsel did not dispute that general words might be competently introduced forbidding all practices which could reasonably be held to constitute a colourable imitation of any one or more of those acts. It is however unnecessary to rely upon general principles for the decision of this point. No authority has been shewn for the proposition maintained by the appellant. On the other hand the observations of Lord Stowell in *Cox* v. *Goodday* (1) and the instances brought under your Lordships' notice by the respondent's counsel, are sufficient to shew that upon conviction of a specific act the Spiritual Court has been in use to admonish the offender, in general terms, to desist from any similar breach of the law ecclesiastical.

On the 9th of March 1880 an inhibition was issued, which after reciting the monition sets forth that it had been made to appear to the learned Judge of the Court of Arches that the appellant had failed to pay due obedience to the said monition in respect of certain matters which are specified in detail, and it is therefore ordered that the appellant be inhibited for the term of three

(1) 2 Consist. 142.

months from the time of publication of the inhibition, and thereafter until the same shall have been duly relaxed, from performing any service of the Church or otherwise exercising the cure of souls within the diocese of Worcester.

Amongst the matters in respect of which the appellant has thus been found to have disobeyed the monition, is his having permitted his curate or assistant minister whilst officiating at the Communion Service and the Celebration of the Holy Communion "to wear certain unlawful ecclesiastical vestments, to wit a vestment known as a biretta and a vestment known as a stole." That finding is said to convict the appellant of a new and substantive ecclesiastical offence different in kind from any of the offences charged in the representation and dealt with by the judgment and the monition which followed upon it. The appellant accordingly maintains that it was incompetent for the judge to try the offence except in a fresh suit duly instituted in terms of the Public Worship Regulation Act, and that in entertaining it as matter of charge against the appellant and in convicting him of it the judge has exceeded the limits of his statutory jurisdiction. The sentence of inhibition which has been pronounced against the appellant is a statutory punishment, and if it remain unrelaxed for a period of more than three years the appellant's benefice will become vacant under the provisions of the Act of 1874. The appellant in these circumstances asserts his right to have prohibition not only against the conviction as being ultra fines of the judge's jurisdiction, but also against the sentence of inhibition. It is argued that the sentence, being a penalty awarded in respect of that conviction as well as in respect of the other practices which the learned judge has competently held to be proved, is void upon the principle of *O'Connell's Case* (1), because it is impossible to divide the sentence or to ascertain the quantum of punishment inflicted in respect of those matters which the Court had no power to deal with or determine.

The learned judge of the Arches Court found that the appellant had failed to obey the monition in respect of fourteen particular acts and practices. Of these, twelve are admittedly ejusdem generis with the acts and practices enumerated in the represen-

(1) 11 Cl. & F. 155.

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tation. Besides the finding which I have already referred to with regard to the wearing of a biretta and a stole, the appellant objects, on the ground of no jurisdiction, to one other finding in the inhibition which relates to an unlawful procession. It is however unnecessary to take special notice of this second objection, because if the argument which the appellant founds upon the first is unsuccessful it is conceded that his whole case against the sentence of inhibition must fail.

Even if it were established that these two matters have been erroneously held to be breaches of the monition, and that they in reality constitute separate ecclesiastical offences so different in their nature from those alleged by the promoters of the suit that they could not have been made the subject of inquiry in investigating the charges preferred by the representation, it by no means follows that the sentence of inhibition is thereby invalidated. The offence which the judge had to deal with at that stage of the suit was disobedience to the monition: and the twelve instances of disobedience in which the jurisdiction of the judge is not challenged would in themselves have been amply sufficient to sustain the sentence. I do not think that these circumstances either in fact or law necessarily lead to the inference that in imposing a penalty within his competency the judge has exceeded his jurisdiction. The case of *O'Connell* v. *Reg.* (1), the sole authority relied upon by the appellant, which was a judgment in error and not in prohibition, has in my opinion no bearing upon the present case; and I am not prepared to assume, and still less to infer, that as a matter of fact Lord Penzance would have pronounced any other sentence had the two findings in question been struck out.

But being of opinion as I am that the alia similia clause was inserted in the monition in accordance with the practice of the Ecclesiastical Courts, I am unable to come to the conclusion that in pronouncing the two findings of which the appellant complains Lord Penzance was acting in excess of his jurisdiction. Whether the wearing of a biretta and a stole did or did not constitute an act of disobedience to a judicial order prohibiting the wearing of an albe, a chasuble and a biretta, or any act or practice of a like

(1) 11 Cl. & F. 155.

nature, is a mixed question of fact and ecclesiastical law, very proper for the consideration of an Ecclesiastical Court, and the cognizance of all such questions appears to me to be committed to the judge of the Arches Court by the 13th section of the Public Worship Regulation Act. Upon the merits of the learned judge's decision I have formed no opinion, and desire to make no comment. If the judge has wrongly decided, his error may be corrected on appeal if the provisions of the statute permit that remedy; but, whether his decision be final or subject to review by a higher ecclesiastical tribunal, it cannot in my opinion be made matter of prohibition in a temporal Court.

I therefore concur in the motion which has been made to your Lordships.

LORD BRAMWELL:—

My Lords, I am entirely of the same opinion, and so much for the same reasons that I greatly doubted whether I ought to trouble your Lordships with any observations in this—to my mind—very unimportant case. I say "unimportant" because there is no question of doctrine, no question of vestment, no question whether Lord Penzance has exercised his mind upon this matter and has come to a wrong conclusion. The only question really is whether a slip has been made by the practitioners in this case. However it is perhaps desirable when one has formed an independent opinion upon the matter to express it.

The first objection which was taken was this; it was said that the monition was wrong by reason of containing a clause admonishing the appellant "to abstain from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth or any of them." Now I have not the least doubt that that was not wrong. It is manifest from the decision of this House in the case of *Mackonochie* v. *Lord Penzance* (1) that the monition has a prospective effect, and it is clear therefore to my mind that it should contain words of that nature. Besides the authorities abundantly shew that those have been used—

(1) 6 App. Cas. 424.

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not necessarily perhaps—but that they have been used. When that is taken into consideration together with the prospective effect of the monition, it is impossible to suppose that there must not be a prohibition of practices to the like effect. It seems to me absurd to suppose that any one could avoid the consequences of the judgment and disregard the monition by what has been called a colourable variation from the practices which were particularly in question upon the trial. For instance, take the case of profane swearing in a church; it is inconceivable that a man could avoid the effect of a monition by simply varying the oaths and imprecations of which he made use. I have no doubt therefore that those words were not improperly in the monition, not only as a matter of authority but as a matter of reasoning.

But then Mr. Charles contended before us that these were words which would prohibit in effect, not the like practices, but practices varying and different; that is to say, he would ask us to read these words which order the appellant "to refrain from all practices, acts, matters and things of the same or a like nature" as though they were "of a different nature." Instead of reading the words as they really are in plain English and attributing the natural meaning to them he would ask us to attribute a different meaning. Interpreting them according to their ordinary and natural meaning as ordinary English words, I have no doubt that those words are rightly in the monition.

But a further objection was taken, and it was said that in the inhibition a new matter was introduced and that the appellant was inhibited from the use of a stole. Now whether the wearing of a stole is "a practice, act, matter or thing of the same or a like nature to those hereinbefore particularly set forth" is a matter upon which I am not competent at present to give an opinion. No doubt the words "chasuble," "albe," and "stole" are English words, and I suppose that one ought to know the meaning of them, and that one ought therefore to be able to say whether the wearing of a stole is "a practice of a like nature" to the wearing of a chasuble or of an albe; but I require to be more informed upon the meaning of those words than I am at present before I say that it is "a practice of a like nature" or that it is not. But I will

assume in the appellant's favour that it is not "a practice of a like nature" and that consequently in respect of the wearing of the stole there ought to have been a fresh proceeding ab initio, and that it was not competent to the learned judge to inhibit the wearing of the stole, the stole not having been mentioned in the original proceedings. Then it is said that if that is so *O'Connell's Case* (1) in this House shews that the judgment was erroneous. Now it is not necessary to say that one perfectly agrees with *O'Connell's Case* (1). It was decided; and the principle of it would possibly be applicable to this case upon a writ of error or upon an appeal; that is to say, if on consideration the Court of Appeal should be of opinion that the wearing of a stole is not "a like practice" to the wearing of a chasuble or of an albe, it might be necessary that a new judgment should be given and that that new judgment should be limited to those practices which were repeated, and should leave the wearing of a stole as a subject of fresh proceedings. But that is not the question which we have to consider here. We have not to consider whether the judgment would be reversed or altered before a competent Court of Appeal; what we have to consider is whether the learned judge has exceeded his jurisdiction. And I wish, as I have made that remark, to say it has not been pretended before us that Lord Penzance's mind has been at all exercised upon this question. But still there is a judgment which has his authority, and which is questioned by this application for a prohibition.

Now I assume that it may be that a Court of Appeal would reverse or alter the judgment which so stands. But, to my mind, there clearly is not the subject-matter of a prohibition. The learned judge had jurisdiction to do whatever the judgment assumes that he has done; he had jurisdiction to make the order which he has made; and if in the exercise of that jurisdiction he has made a mistake (and I must repeat that his mind has not been exercised upon the matter) that is the subject-matter of an appeal, if an appeal lies, and not of a prohibition. He has done nothing that he had not jurisdiction to do.

No doubt there are some cases in which an erroneous judgment

(1) 11 Cl. & F. 155.

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may be the subject-matter either of an appeal, or of a writ of error, and of a prohibition; but there are others (and this is one of them) in which the error, if there is one, is the subject-matter not of a prohibition, but of appeal only.

I am of opinion therefore that this appeal should be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 22nd May 1882.

Solicitors for appellant: *Brooks, Jenkins, & Co.*
Solicitor for Lord Penzance: *The Solicitor, Treasury.*
Solicitors for respondent Perkins: *Tebbs & Sons.*

[HOUSE OF LORDS.]

CALEDONIAN RAILWAY COMPANY . . APPELLANTS;
WALKER'S TRUSTEES . . . . . RESPONDENTS.

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Railway Acts — Land injuriously affected by Construction of the Works — Compensation — Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 *Vict. c.* 33), *s.* 6, *and Land Clauses Consolidation (Scotland) Act*, 1845 (8 *Vict. c.* 19)—*Agreement that Claim should not be barred by reason of no Land being taken.*

The 6th section of the Scotch Railways Clauses Act of 1845 (similar in the English Act), provides, inter alia, that the railway "company shall make to the owners and occupiers of, and all other parties interested in, any lands taken, . . . or injuriously affected by the construction thereof, full compensation for the value of the lands so taken, and for all damage sustained by such owners," &c. And it then cites the Lands Clauses Consolidation (Scotland) Act, 1845, as the machinery by which compensation is to be adjudged.

In order to found a claim for compensation under this section, some special or peculiar damage must be done to the lands by reason of the construction of the works, which diminishes the value of the lands, which damage would have been the subject of an action at law before the statute.

Where, therefore, an access to private property by a public highway or private way is interfered with by the construction of the works, and the value of the property, irrespective of any particular use which may be made of it, is so dependent upon the existence of that access as to be substantially diminished by its obstruction, then the owner is entitled to compensation for such interference.

But no compensation is given for damages if the thing done was one for which, if done without any statutory power, no action could have been maintained; nor when a right of action, which would have existed if the works had not been authorized by statute, would have been merely personal. Nor when damage arises, not out of the execution, but only out of the subsequent use of the works. Nor for the loss of trade or custom by reason of a work not otherwise affecting the house in or upon which the trade has been carried on.

Trustees were possessed of a spinning mill ninety yards from an important main thoroughfare in Glasgow, having parallel accesses on the level from two sides of the mill to the thoroughfare.

A railway company under their special Act cut off entirely one access, substituting therefor a deviated road over a bridge with steep gradients. And the other access they diverted and made less convenient. But none of the operations were carried on ex adverso the premises. When the Bill was before Parliament the trustees were induced to withdraw their opposition in consideration of an agreement, by which the company undertook, that in

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the event of the land of the trustees and of others being injuriously affected by the construction of any of the works proposed by the bill, their claim to compensation should not be barred by reason of the company not taking part of their land. The trustees claimed compensation for the diminished value of their premises by reason of the detour and gradients :—

Held, affirming the decision of the Court below, that though the agreement gave no right to compensation, the trustees were entitled to it under the Railways and Lands Clauses Consolidation (Scotland) Acts, 1845.

Per LORD SELBORNE, L.C. :—The obstruction of access to a private property by a public road need not be ex adverso, but it must be proximate and not remote or indefinite to entitle the owner of that property to compensation for the loss of it.

And—It is a question whether a mere change of gradient alone would be a proper subject for compensation.

Metropolitan Board of Works v. *McCarthy* (Law Rep. 7 H. L. 243) held undistinguishable.

The Caledonian Railway Co. v. *Ogilvy* (2 Macq. 229) explained; and distinguished.

Chamberlain v. *West End of London Railway Co.* (2 B. & S. 617), and *Beckett* v. *Midland Railway Co.* (Law Rep. 3 C. P. 82) approved. *Ricket* v. *Metropolitan Railway Co.* (Law Rep. 2 H. L. 175) examined.

Conflicting Decisions of this House.

Per LORD SELBORNE, L.C. :—It is the duty of this House to maintain as far as possible the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting.

And—All the above decisions of this House appear to be capable of being explained and justified upon consistent principles.

See remarks of LORD BLACKBURN as to the cases of *Ogilvy* and *McCarthy* not being reconcilable, pp. 294, 302.

APPEAL from the Second Division of the Court of Session, Scotland.

In 1873 the appellants, the Caledonian Railway Company, applied to Parliament to make a new line of railway on the site of part of the west side of Eglinton Street, Glasgow (which is one of the main thoroughfares of that city) on the south side of the Clyde.

The respondents, Walker's trustees, are proprietors of a piece of ground lying to the west side of Eglinton Street, on which is built a cotton mill and relative buildings. It is in extent over 6000 square yards, and is bounded upon the north by Canal Street, on the east by Francis Street, and on the south by Victoria

Street. The east front of the premises are parallel to, and ninety yards distant from, Eglinton Street.

Before the operations of the appellant company, Canal Street and Victoria Street, which are public highways and sixty feet wide, were level streets intersecting Eglinton Street at right angles, affording direct and easy access from both sides of the premises to Eglinton Street.

At a considerable distance north of Canal Street there is another street called Cook Street; but there was no communication between Cook Street and Canal Street except by Eglinton Street.

When the appellants' bill was before Parliament, the respondents, being of opinion that their property would be seriously injured by the proposed operations, with other owners of property in the neighbourhood, petitioned against the appellants' bill. But when the bill was in dependence in the House of Lords the appellants offered to the respondents (and the others with them) the following undertaking, dated the 4th of July, 1873:—

"Gentlemen,—In consideration of your withdrawing all further opposition to this bill, we, the Caledonian Railway Company, do hereby undertake that, if and so far as you are, in the judgment of the arbiters or oversman, or jury to be appointed under the Lands Clauses Consolidation (Scotland) Act, 1845, as after mentioned, injuriously affected by the construction of any of the works authorized by this bill, your claim for compensation shall not be barred by reason of our not taking any part of your respective lands, and the amount of such compensation, if any, if not agreed upon, shall be determined in the manner provided by the Lands Clauses Consolidation (Scotland) Act, 1845, for the determination of cases of disputed compensation; but without prejudice to all claims competent to you, or any of you, under and by virtue of the said Act, and of any other Acts regulating the construction of railways, in all cases where the lands of you, or any of you, or any part thereof, may be taken by us for the purposes of this Act."

The respondents, with the other petitioners, thereupon withdrew their opposition to the bill, which became law as the Caledonian Railway (Gordon Street (Glasgow) Station) Act, 1873. The Lands Clauses Consolidation (Scotland) Act, 1845, and the

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Railways Clauses Consolidation (Scotland) Act, 1845, are incorporated with the Act.

In virtue of the powers contained in that Act, the appellants have converted into a line of railway the whole of the west side of Eglinton Street between Canal Street and Victoria Street, and for a considerable distance north and south of those streets, and they have thus destroyed both the accesses into Eglinton Street as they stood. They have formed a new street called Salkeld Street between the line of railway and the respondent's property, running southward from Cook Street, and nearly parallel to Eglinton Street, until it reaches a point between Francis Street and Eglinton Street, where it crosses the new line of railway by means of a bridge, and it then bends in a south-easterly direction towards Eglinton Street, which it joins.

Both Canal Street and Victoria Street are connected with Salkeld Street. The result of the operations is that the respondents' new access by Canal and Salkeld Streets as compared with the old one by Canal and Eglinton Streets to a common point, is 1485 feet longer; while their new access to Eglinton Street by Victoria and Salkeld Streets is 265 feet longer than the old one by Victoria Street. The steepest gradient of Salkeld Street as compared with Eglinton Street is 1 in 34 compared with 1 in 59 in a corresponding portion of Eglinton Street, and the gradient of Victoria Street is made for 116 feet, 1 in 20, and for 197 feet, 1 in 34·7. The gradient of Canal Street itself, so far as it exists, has not been altered, and Victoria Street, so far as it is ex adverso of the respondents' property, is still on the level. No part of the respondents' property has been taken, and none of the operations have been carried on ex adverso of that property.

On the completion of the works in 1879, the respondents served upon the appellants the usual statutory notice to have the amount of their claim fixed by arbitration under the Lands Clauses Consolidation (Scotland) Act, 1845, nominating their arbiter, and called upon the appellant company to nominate theirs. This they did, but at the same time raised a note of suspension and interdict to have the parties interdicted from proceeding, on the ground that the claim of the respondents presented no case in law on which they could demand compensation.

In their record before the Lord Ordinary, the appellants averred that the respondents' property has sustained no permanent damage or peculiar physical injury, and although the respondents, in using Victoria Street as altered, have to use at some distance from their property a somewhat steeper gradient than before, they have to do this in common with all the members of the public who require to use the said street. And they pleaded, the respondents not being entitled to compensation either under the written undertaking or under any of the statutes, the note of suspension and interdict ought to be passed.

The respondents answered that they had a peculiar interest in Canal Street and Victoria Street, which formed the special and indeed only accesses to the property, and that the construction of railway walls "across the line of those streets cuts off the access between the respondents' property and Eglinton Street, the leading thoroughfare of the district, and necessitates a longer detour for all carts, carriages, and passengers coming to or leaving the respondents' works. The direct access which the respondents' property formerly had by the said streets to Eglinton Street rendered their property more valuable, and by the construction of the appellants' works it has been permanently damaged, and its value greatly diminished." And they pleaded, inter alia, the appellants having by their undertaking constituted arbiters the sole judges whether and to what extent the respondents' property is injuriously affected, they were bound to proceed with the arbitration; and the property having been injuriously affected within the meaning of the special Act and the Acts therewith incorporated, the respondents were entitled to have the same assessed in terms of the Lands Clauses Acts.

The Lord Ordinary refused the interdict on its merits. The Court of Session adhered, but reserved their opinion on the question of relevancy until the facts should be found by the arbiters.

The arbiters differed in opinion, and the oversman appointed had to pronounce an award, the material portions of which will be found in Lord Blackburn's opinion (1). The oversman in the result found that the respondents' property was injuriously affected by the construction of the appellants' works; and on the assump-

(1) Post, p. 291.

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tion that they were legally entitled to compensation by the appellants for the injury so caused fixed the pecuniary amount of the compensation at the sum of £1500, allocating £1200 in respect of damage by detour and £300 to compensation for damage by change of gradients.

The respondents then brought the present action for recovery of the sum awarded, maintaining that they were entitled to decree for the compensation assessed under the written undertaking, or, secondly, under the 6th section of the Railways Clauses Act of 1845 (1), which embodies the Lands Clauses Act, 1845, as containing the machinery by which compensation is to be adjudged.

On the 10th of November the Lord Ordinary (2) sustained the oversman's award.

On a reclaiming note the Second Division by interlocutor, dated the 21st of January, 1881, adhered, their Lordships being of opinion that if there had been no agreement between the parties, on the 6th section of the Railways Clauses Consolidation (Scotland) Act, 1845, the respondents were entitled to compensation (3).

On appeal,

Feb. 16, 17, 20. The *Lord Advocate* (*J. B. Balfour*, Q.C.) and Mr. *Benjamin*, Q.C. (with them, Mr. *Horace Davey*, Q.C.), maintained for the appellants that the decision of the Court below was erroneous. The main question, as to compensation under the Railway Act, was whether the case fell under the principle of the cases of which *Caledonian Railway Co.* v. *Ogilvy* (4) is the chief, or under the principle applied in *Metropolitan Board of Works* v. *McCarthy* (5).

The former case settled with respect to a level crossing, that that was not such an injurious affecting of the lands as would

(1) 8 & 9 Vict. c. 33, s. 6, provides, "That the railway company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used and for all damage sustained by such owners," &c.

(2) Lord Curriehill.

(3) Court of Sess. Cas. 4th Series, vol. viii. p. 405.

(4) 2 Macq. 229.

(5) Law Rep. 7 H. L. 243.

bring in a claim under the Railways Clauses Act, while in *McCarthy's Case* (1) the deprivation of a water frontage was held injuriously to affect under the statutes.

Here, there were only the two elements of gradient and detour; there was no interference with the immediate frontage, nor any interference with the levels of the streets ex adverso, or opposite the frontage. The oversman's finding (sect. 8) expressed the mixed question of law and fact, that the property is injuriously affected by means of the gradients and detour. Such a finding came to this, that any person who had to travel that part of the road, if he happened to have property near it would be entitled to compensation. And it was difficult to see how there was any difference between the respondents and the world at large, except in this, that they would, living near it, suffer the inconvenience more frequently.

Unless there had been a limitation by implication or otherwise of the general principles of *Ogilvy's Case* (2) it must be held to apply here. There a public road was, under the sanction of an Act of Parliament, crossed by the railway on a level, within fifty yards of the complainant's lodge, and gates were placed across the public road. Held, that he had no claim for compensation. Lord Cranworth said there that there was no damage at all to the estate, except that the owner of the estate would oftener have a right of action from time to time than other persons, inasmuch as he would pass the spot oftener. *Chamberlain* v. *West End of London Railway Co.* (3), relied on by the Respondents, was not like this when examined. There was there a special injury to the property diminishing its value for a particular kind of use, and the access was interfered with in a manner quite different from here. And the arbiter found that the houses were deteriorated, because the number of persons passing would be diminished, and consequently the prospect of customers to the occupiers of the houses. Here there was no finding that any person would go the less along Canal Street or Victoria Street by reason of the alterations.

In *Ricket* v. *Metropolitan Railway Co.* (May, 1877) (4) *Ogilvy's Case* (2) was approved, and the reasoning of it was used as one of

(1) Law Rep. 7 H. L. 243.
(2) 2 Macq. 229.
(3) 2 B. & S. 605 and 617.
(4) Law Rep. 2 H. L. 175.

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the media in reaching the result. There Lord Chelmsford, L.C. (1), to whom it seemed hopeless to reconcile the cases, said "that the criterion of a party's right to damages is correctly stated by Lord Campbell in *Re Penny* and *South Eastern Railway Co.* (2), 'unless the particular injury would have been actionable before the company had acquired the statutory power, it is not an injury for which compensation can be claimed.' At the same time the observation of Lord Cranworth in *Ogilvy's Case* (3) must not be lost sight of, that 'it does not follow that a party would have a right to compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment but a right of action.'" Then in proceeding to examine *Ogilvy's Case* he said (3), "The owner (Mr. Ogilvy) of the house had no other right over the road than that which belonged to the public generally, and the erection of the gates across the road, where the railway crossed it upon a level, was essential to the public safety. It is doubtful whether the owner of the house sustained any injury different in kind, though it might be greater in degree, from that of the rest of the public; and therefore it was questionable whether he could have maintained an action if the obstruction had been created without the authority of Parliament." Those words were directly applicable here.

Lord Chelmsford also said that the 6th section of the Railways Clauses (England) Act, 8 & 9 Vict. c. 20, and the 68th section of the Lands Clauses (England) Act, 8 Vict. c. 18, were both inapplicable, as Ricket's damage arose from the temporary operations of the company and not from their permanent works; that the claim came under the 16th section of the former Act. But no reason appeared to suppose that the decision would have been different if it had been a case of permanent injury.

[LORD SELBORNE, L.C.:—Throughout the 16th section refers to permanent as well as temporary damage.]

In that case Lord Cranworth (4) laid it down that "Both principle and authority seemed to shew that no case came within the purview of the statutes, unless where some damage had been occasioned to the land itself, in respect of which but for the

(1) Law Rep. 2 H. L. at p. 187.
(2) 7 E. & B. 660.
(3) Law Rep. 2 H. L. at p. 190.
(4) Ibid. at p. 198.

statute the complaining party might have maintained an action. The injury must be an actual injury to land itself, as by loosing the foundations of buildings on it, obstructing its lights, or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration."

McCarthy's Case (1) fell under this language, and *Beckett* v. *Midland Railway Co.* (Nov. 1867) (2), fulfilled all Lord Cranworth's requirements, and therefore the appellants did not quarrel with it. In *Beckett's Case* (2) the defendant railway company erected an embankment on a portion of a highway opposite the plaintiff's house, and thereby narrowed the road from fifty to thirty-three feet, thus, according to the evidence, materially diminishing the value of the houses for letting or selling. Carriages were compelled to go some distance beyond the plaintiff's gate before they could turn.

That was a special and peculiar injury to the frontage of the property, an injury that could not be common to the proprietor and to everybody else as well. And quite different from that here, where the gradients and detour commenced, not ex adverso but ninety yards away.

As far as the facts of *McCarthy's Case* (1) went, they were totally different from this, and quite distinct from *Ogilvy's Case* (3). McCarthy was occupier of a house in close proximity to a draw-lock which opened into the Thames. The distance between his house and the top of the dock was twenty feet, and that space was taken up with a public road. The dock was entirely destroyed by the works of the Thames Embankment, and McCarthy was found entitled to compensation on the ground that a special value was attached to the premises by reason of the proximity or relative position of the dock. Lord Cairns put it that the claimant had two highways—a highway by road, and a highway by water in front of his premises. It was very difficult to say that that advantage of the water frontage so near his house was not a valuable appurtenant clearly connected with the land, and the deprivation of it might very well be described as an injuriously affecting of the property as distinguished from personal incon-

(1) Law Rep. 7 H. L. 243. (2) Law Rep. 3 C. P. 82.
(3) 2 Macq. 229.

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venience. It was not a thing which everybody else could suffer in the same way or degree: it was peculiar to McCarthy's property.

The right interfered with must be ex adverso, or at least must have a degree of proximity to the affected property which made it, in a reasonable sense, an appurtenant of the property. See remarks of Lord Penzance (1), who demands, as necessary to the claim, a degree of proximity to the affected frontage, which is not substantiated in the present case.

The test came to this, if you have such a special and peculiar relation between the subject that is damaged and the property, as is different from that enjoyed by the rest of the world, then your claim will arise: if you have not, then your claim will not arise. For instance, if the alteration of the level of the road was by lowering it, and the owner of the house had steps presented to him instead of the road, that interference is sharply distinguished from a case in which persons going along a road have to go up or down a gradient.

They submitted, as a result of all the cases, that although there were some expressions of opinion in *McCarthy's Case* (2) which, apart from other expressions, might be interpreted as enlarging the previously understood grounds of claim, yet when the cases and opinions are all read together, they do not warrant the existence of a claim like the present, where the use is a use like that of the rest of the public, and where, if any difference, it is a difference only in the amount of the use.

The arbiter had not separated his damage in respect of the gradients, and there may be a matter of difference in point of law between the gradient of the Canal Street access and the gradient arising from the bridge. An over bridge was a later statutory substitution for a level crossing—the provisions of the Railway Acts originally permitted them—but by the Railways Clauses Consolidation (Scotland) Act, 1845, s. 39, they are to be the exception, to avoid danger and inconvenience to the public while the railway is being used. That being so, the over or under bridge comes under the same legal category as a level crossing. And if a level crossing was incidental to the use of the railway; and the incon-

(1) Law Rep. 7 H. L. at p. 263. (2) Law Rep. 7 H. L. 243.

venience caused by it, then it must be the same with what is a statutory substitution or equivalent for a level crossing. Therefore the inconvenience caused by a rising gradient over a bridge, is an inconvenience of the same character as an inconvenience arising from the gates of a level crossing, and in Lord Cranworth's words, is not a damage to the estate.

[They also commented on *Lyon* v. *Fishmongers' Co.* (1), *Duke of Buccleugh* v. *Metropolitan Board of Works* (2).]

As to the agreement, it did not enlarge the respondents' rights. It was purely precautionary, to provide against it appearing that any claims which the owner of the property might have should be prevented from being stateable.

Sir F. Herschell, S.G., and the *Solicitor General for Scotland* (Mr. *Asher*, Q.C.), contended for the respondents, that this case on the main question was undistinguishable from the cases of *McCarthy* (3) and *Chamberlain* (4). The respondents' claim came more particularly to be determined under the 6th section of the Scotch Railways Clauses Act of 1845, similar to the English Railway Act The English cases were generally decided upon the terms of the 68th section of the Lands Clauses Act, which deals with "compensation in respect of any lands or of any interest therein which shall have been taken for or injuriously affected by the execution of the works." But though there is no section in the Scotch Lands Clauses Act corresponding to the 68th section of the English Act (8 Vict. c. 18), the decisions under the latter section in England are perfectly applicable in Scotch cases, and in this instance were conclusive in favour of the respondents. To entitle to compensation two propositions must be proved as correct: first, that the acts done could not have been done without statutory authority, and if done without statutory authority would entitle the plaintiff to an action; secondly, if the plaintiff connect the land with the damages, then he is entitled to compensation. The view of what is sufficient connection must be different in regard to different cases. The appellants did not deny that interference with the highway could injuriously affect; but said that the land must be

(1) 1 App. Cas. 662.
(2) Law Rep. 5 H. L. 418.
(3) Law Rep. 7 H. L. 243.
(4) 2 B. & S. 605, 617.

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proximately affected. They submitted it was so here. The value of the highway to property is not being able to get out on the few yards in front of your house, for if the highway is obstructed within a short distance of your house the whole way is obstructed. In principle that is an obstruction, which, though common to all the lieges, injuriously affects property.

[LORD SELBORNE, L.C.:—In *Winterbotham* v. *Lord Derby* (1) it was held that to maintain an action the plaintiff must suffer some substantial damage peculiar to himself beyond that suffered by the rest of the world.]

That was the case here. The principal decision pressed against them was the *Caledonian Railway Co.* v. *Ogilvy* (2); but the ground of judgment in that case was that there the alleged injury was only a case of personal inconvenience and not damage to the estate. See Lord Cranworth's opinion (3). Here the injury was consequent on the construction and was altogether distinct from the use, and therefore altogether distinct from *Ogilvy's Case* (2), where the number of trains bore a ratio to the inconvenience caused. And that case was explained by Erle, C.J., in *Chamberlain's Case* (4), by Lord Chelmsford in *Ricket's Case* (5) and *McCarthy's Case* (6); and by Willes, J., in *Beckett's Case* (7) and *McCarthy's Case* (8); and by Bovill, J., in *Beckett's Case* (9), as an authority for no more than this, that personal inconvenience as distinguished from diminished value of land will not entitle to compensation. The decisions since the case of *Ogilvy* supported this distinction.

In *Chamberlain's Case* (10), which closely resembled this, the public road passing his houses, at a distance of seventy yards from them, was shut up, so as to make it a cul de sac, and a deviated road was provided. The ground of that decision was that although the railway did not touch the ground ex adverso, or in fact, yet that where the access was affected, compensation is due.

(1) Law Rep. 2 Ex. 316.
(2) 2 Macq. 229.
(3) Ibid. at p. 236.
(4) 2 B. & S. at p. 638.
(5) Law Rep. 2 H. L. 190.
(6) Law Rep. 7 H. L. at p. 257.
(7) Law Rep. 3 C. P. 104.
(8) Law Rep. 7 C. P. at p. 513.
(9) Law Rep. 3 C. P. at p. 93.
(10) 2 B. & S. 605.

And in *Beckett's Case* (1) Willes, J., said, "To entitle a claimant to compensation he must have sustained a particular damage from the execution of the works, and the damage must be one for which he might have maintained an action if the work was not authorized by Parliament; and further, the complainant must establish that the injury was an injury to his estate and not a mere obstruction or inconvenience to him personally, or to his trade, and also that the damage complained of must be one which is sustained in respect of the ownership of the property and not in respect of any particular use to which it may from time to time be put.

In *McCarthy's Case* (2) the dock interfered with—which it is to be noticed was not contiguous to the house, but twenty feet away—was only of use as leading to the highway of the river. So what truly damaged the claimant there, was the stopping up of the entrance into the river—which was 400 feet away. The stopping up the end stopped it the whole way. Here it was analogous; the appellants had stopped up the main street at its juncture with the two other streets leading to the respondents' premises.

There was no difference in principle whether the obstruction was ex adverso or not, though that might affect the amount of compensation, but in each case it must be seen whether damage is proximate or too remote. Their argument was put distinctly by Lord Penzance in *McCarthy's Case* (3) "In each case the right to compensate will accrue, whenever it can be established to the satisfaction of the jury or arbiter that a special value attached to the premises in question, by reason of their proximity to, or relative position with, highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction."

And here the arbiter had found that the damage is a damage having such a connection with the lands as to diminish the value to the extent of £1500. Therefore they submitted that this case was within the principle of all the cases; that the damage is proximate and not remote, and that the decision of the Court below in sustaining the arbiter's award was correct.

(1) Law Rep. 3 C. P. at p. 94. (2) Law Rep. 7 H. L. 243.
(3) Law Rep. 7 H. L. at p. 263–4.

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As to the agreement. Under it the appellants were precluded from disputing the respondents' claim. The language could not be interpreted literally. The intention was to give some benefit, and their view was that fairly construed it imports that compensation would fall to be paid if an injury were proved. The word "barred," meant "taken away," "cut off," or "excluded," and suggests that the right is there, if the bar does not exist. In other words the view warranted by the language is that the claim is to be disposed of on an assumption (that part of their lands were taken) which is not true in fact, for the purpose of giving legal validity to the claim, provided that damage is proved.

The *Lord Advocate*, in reply:—

While true that the thing must be actionable but for the statutory authority; the converse of that proposition is not true on the cases. It is not the case that everything which but for the statute would be actionable would give rise to a claim for compensation, see opinions of Lord Cranworth (1) and Lord Chelmsford (2).

[LORD BLACKBURN:—That was finally settled in *Hammersmith Railway Co.* v. *Brand* (3).]

The respondents' view of *Ogilvy's Case* (4) was, that it was decided against the complainer, because the things complained of were done in the use of the railway and not in the construction of the works; but that was not the ratio decidendi in fact—that was developed in *Brand's Case* (3).

In *Beckett's Case* (5) the injury affected the complainant's access proper, and in *McCarthy's Case* (6), it was explained that the water highway might in a reasonable sense be called an appendage to the house.

There was a great distinction between a right which a man has of proceeding out straight from his property and getting on to the public ground, and a right which a man has, when he proceeds to go along a public street the same as anybody else.

It is said *Chamberlain's Case* (7) is a standing authority against

(1) 2 Macq. at p. 235.
(2) Law Rep. 7 H. L. at p. 256.
(3) Law Rep. 4 H. L. 171.
(4) 2 Macq. 229.
(5) Law Rep. 3 C. P. 82.
(6) Law Rep. 7 H. L. 243.
(7) 2 B. & S. 605, 617.

the appellants, then in so far as it proceeds on ground which was rejected in *Ricket's Case* (1), the authority of *Chamberlain's Case* (2) must be destroyed.

[LORD BLACKBURN:—But in *McCarthy's Case* (3) it was held that *Chamberlain's* and *Ricket's Cases* were consistent, and *Chamberlain's Case* (2) was affirmed.]

That conclusion was arrived at by subtracting the shop element, but *Chamberlain's Case* (2) had another element in it, his property was sunk down in a hole.

There was a separate point as to the alteration of the gradient, at all events as regards the bridge, for that is incidental to the use, and not to the construction.

Certainly, this was a case where the inconvenience suffered is more remote than in any case in which a claim for compensation had been allowed.

Judgment was given as follows:—

March 29. LORD SELBORNE, L.C.:—

My Lords, the only facts in this case which I think material to the question of principle to be determined are that, before the construction of the appellants' works under the authority given by their Act of 1873, the property of the respondents had a frontage to Canal Street, in Glasgow, and had by that street a direct, straight, and practically level access (at the distance of about ninety yards), for all sorts of traffic, to Eglinton Street, one of the main thoroughfares of that city; and that, by the works of the appellants, that direct access to Eglinton Street has been altogether cut off and taken away, a more distant and circuitous access, crossing the railway by a bridge with a rather steep gradient, being substituted for it. Another direct access to Eglinton Street, from the back of the appellants' premises, has been rendered less convenient, but upon that part of the case I do not think it necessary to dwell.

When the Bill was before Parliament in 1873, the respondents

(1) Law Rep. 2 H. L. 175. (2) 2 B. & S. 605, 617.
(3) Law Rep. 7 H. L. 243.

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and some other persons, who (like them) had petitioned against it, withdrew their opposition in consideration of an agreement in writing, by which the Caledonian Company undertook that if and so far as they or any of them might in the judgment of the arbiters or oversman, or jury, to be appointed under the Lands Clauses Consolidation (Scotland) Act of 1845, be injuriously affected by the construction of any of the works proposed to be authorized by the Bill, their claim for compensation should not be barred by reason of the company not taking any part of their respective lands, and that the amount of such compensation, if not agreed upon, should be determined in the manner provided by that Act. When the works were executed, the respondents made a claim for compensation, and arbiters and an oversman were appointed, under protest, on the company's part. After an ineffectual attempt by the company to stop the arbitration, the oversman finally made an award by which he found the facts, and, on the assumption that the claimants were legally entitled to be compensated by the company for the injury caused to them, assessed the pecuniary amount of the compensation at £1500, allocating £1200 thereof as applicable to compensation for damage by detour, and £300 to compensation for damage by change of gradients. In the view which I take of the case, this division of the difference between the value of the access taken away, and that of the new access substituted for it is not material. If the respondents were entitled to compensation, it was right to award the whole estimated amount of the damage actually sustained by them, and I see no objection in principle to the mode of measuring that damage which the oversman thought fit to adopt. Whether a mere change of gradient would have been itself a subject of compensation, if the direct access to Eglinton Street had in all other respects remained unchanged, is a point on which I do not think it necessary, under the circumstances of this case, to express an opinion.

It was argued for the respondents that the agreement, on the faith of which the opposition to the bill was withdrawn, ought, in the cases of those petitioners (among whom were the respondents) from whom no land was taken by the company, to be deemed an admission, for valuable consideration, of the right to compensa-

tion. But with that argument (which seems to have found some degree of favour in the Court below), I cannot agree. All that the company did was to bind themselves not to object on one particular ground, viz., because no land was taken. It was said that an objection on that ground only would have been manifestly untenable in law, and to this I agree. But the parties, nevertheless, seem to have thought that it was worth their while to guard against it; and I think it impossible to infer an implied waiver of all objections from an express waiver of one, whether that was an objection which was obviously untenable or not.

Upon the more important question of the respondents' right to the compensation which the oversman has awarded them, reliance was placed, in the argument at the Bar, on decisions of your Lordships' House. For the appellants it was contended, that compensation was excluded by *Caledonian Railway Co.* v. *Ogilvy* (1), and *Ricket* v. *Metropolitan Railway Co.* (2). The respondents relied on *Metropolitan Board of Works* v. *McCarthy* (3).

It is your Lordships' duty to maintain, as far as you possibly can, the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting. The reasons which learned Lords who concurred in a particular decision may have assigned for their opinions, have not the same degree of authority with the decisions themselves. A judgment which is right, and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the House.

With this preface, I think it right to say that all the three decisions of this House, to which I have referred, appear to me to be capable of being explained and justified upon consistent principles; the propositions which I regard as having been established

(1) 2 Macq. 229. (2) Law Rep. 2 H. L. 175.
(3) Law Rep. 7 H. L. 243.

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by them, and by another judgment of your Lordships in the case of *Hammersmith Railway Co.* v. *Brand* (1), being these :—

1. When a right of action, which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts. 2. When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation. 3. Loss of trade or custom, by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. 4. The obstruction by the execution of the work, of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation. In the case of *Caledonian Railway Co.* v. *Ogilvy* (2), Lord Cranworth stated the question to be, "Whether a proprietor, who holds land adjoining a newly constructed railway, can under the clauses of the general Act and the special Acts, which give him a right of compensation in respect of any injurious effect upon his lands, claim from the company compensation, *because at a short distance from the entrance to his grounds the railway traverses an important public road on a level;*" that road (as his Lordship immediately afterwards proceeded to say), being "the most common" (though not the only), "and the best approach to the pursuer's house." All that your Lordships' then decided was, that it was not competent to the sheriff to give any redress *in respect of this level crossing.*

It is material, in order to understand rightly the reasons assigned for that decision, to bear in mind that, unless the mere fact of rails, &c., being laid across the public road ought to have been held to constitute an actionable obstruction of the pursuer's right to use it (if there had been no Act of Parliament), that right was not obstructed by the execution of the works of the railway. The pursuer complained of "*a constant liability* to great inconvenience, interruption, and delay" (by reason of the closing of

(1) Law Rep. 4 H. L. 171. (2) 2 Macq. 229.

gates across the public road as often as trains were passing or about to pass); and of danger and alarm to those passing to and from the house, "from the risk of the startling of horses when detained in a narrow road facing the barrier, by the passing and noise of the engines and trains." These were not distinct heads of claim, one for delay, &c., by closing the gates, and another for danger, &c., by the noise of engines and trains; but were only specifications of the manner in which the pursuer proposed to establish his main proposition, that "very material injury" had been "done to the place as a residence, and deterioration caused to the amenity and value of the house and policy, by the railway crossing the approach to the lodge and gate on the level, immediately in front of and within a few yards of the gate, whereby the present free and open communication with the high road at a very short distance was cut off, and all access prevented, *without a constant liability to*," &c. (*ut supra.*) The communication was not cut off, and access was not prevented, except when trains were passing; the temporary obstruction of the public road by shutting gates across it at those times, as well as the noise complained of, were incidents, not of the construction, but of the use of the line.

The decision, therefore, would have been justified (assuming that the mere placing of rails, &c., across the road would have given no right of action to the pursuer), upon the same grounds on which this House afterwards decided the case of *Hammersmith Railway Co.* v. *Brand* (1), by which the second of the four propositions which I have stated was established. The peculiar circumstances of the latter case, in which Mr. Brand's real estate suffered physical injury from the vibration of trains, made it necessary for this House to enter into a minute criticism of the language of the compensation clauses in the Acts of Parliament, which, in Mr. Ogilvy's case, was not necessary; because Lord Cranworth and Lord St. Leonards both thought that the injury for which Mr. Ogilvy might have brought his action if the railway had not been authorized by Parliament would have been personal to himself and not an injury to his land, or to any right incident thereto.

But, although the judgment in *Ogilvy's Case* (2) was not ex-

(1) Law Rep. 4 H. L. 171. (2) 2 Macq. 229.

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pressly rested on the distinction between injuries from the construction, and injuries from the use, of the railway, such a distinction did, nevertheless, exist in the facts, and (as it seems to me) was implied in the reasoning of the noble and learned Lords, especially of Lord Cranworth (1); and in the argument for the appellants, in *Brand's Case* (2), it was so regarded. "The words of the Act" (it was there said) "refer to land taken, or injuriously affected in the making of the railway; and to that matter they were confined by this House, in the case of the *Caledonian Railway Co.* v. *Ogilvy*." (3) The mere act of placing rails, &c., across the road at the level crossing (by itself, and apart from the contemplated use of the railway for the passage of engines and trains) was considered by the House not to affect injuriously the access to Mr. Ogilvy's land. If the *prospective liability* to the obstruction of the road by the use of the railway for the purposes for which it was made, had been, in the judgment of the House, such an injury as would have been actionable had there been no statutory authority, then I should have thought the conclusion ought to have been, that this was an injury, not to Mr. Ogilvy personally, but to his estate, and, therefore, a proper subject for compensation. But the House evidently considered that there would have been no right of action in respect of such a merely prospective liability to obstruction; and the reasoning of the noble and learned Lords was therefore addressed to the legal consequences of obstructions de facto, when they might actually happen by the use of the line. As to these, they thought (and I am not myself satisfied that they were mistaken in thinking, though the decision in *Brand's Case* (2) makes the point now of little or no practical importance) that each particular detention, when Mr. Ogilvy or his servants, being upon the road, might happen to be stopped by the closing of the gates, for passing trains, would (like the nuisance from noise, &c.), be an injury ejusdem generis with that which any other persons using the road might suffer, though accruing to him more frequently than to others; and that any right of action which he might have had for each such detention (if Parliament had not authorized the use of the railway) would

(1) 2 Macq. at pp. 235, 238. (2) Law Rep. 4 H. L. 171.
(3) 2 Macq. 229.

have been personal, and not incident to the ownership of his land.

But the point (the only point as it seems to me), which was really determined in that case was, that the mere fact of a railway crossing at a level the access, by a public road, to a landowner's house or estate, with its incidental liability to frequent stoppages by the passage of trains after the line should be used for traffic, would not have been a cause of action if the work had not been authorized, and therefore was not a subject for compensation under the Acts. I suppose that (unless the mere laying of the rails, &c., would have given such a cause of action) this was an unavoidable consequence of the technical interpretation of the words "injuriously affected," as applicable only to something which would have been a legal injuria, in the case of an unauthorized work, an interpretation which it is too late to criticise now; though, if the point were open, I should myself think it questionable whether there was not a fallacy in such a test depending upon the hypothesis of the same work being executed without authority, which (having regard to the nature and operation of Acts for the execution of that class of public works) can hardly be supposed to have been within the contemplation of Parliament.

In the case of *Brand* (1) (in which I was myself counsel on the unsuccessful side), the question, whether a prospective liability to necessary injury, from the use of the railway for the purpose for which it was made and authorized, was not a subject for compensation properly arising out of the execution of the works, was again raised, and was argued at greater length, and with much greater distinctness, than might be inferred from the report of the argument. The only passage in that report, which seems clearly to point to it, is (1), where it is thus put: "This is, in fact, a servitude imposed on the plaintiff's land, and the imposition of that servitude, which is a cause of damage, must be the subject of compensation."

The opinion of Lush, J., in that case (2), approved and adopted by Lord Cairns, who dissented from your Lordships' judgment (3), was in accordance with that view. But that argument was rejected

(1) Law Rep. 4 H. L. 171. (2) Law Rep. 4 H. L. 184, 188.
(3) Law Rep. 4 H. L. 222, 223.

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by the House, Lord Chelmsford (who moved the judgment), saying (1): "To argue that, as the injury could not have occurred unless the railway had been previously constructed, therefore it was caused "by the construction thereof," is certainly a strong example of the illogical reasoning of "post hoc, ergo propter hoc," and would extend to every accident or injury occurring upon the railway after its construction, which, of course, could not have happened if it had not been constructed." I should not myself have thought that the argument did involve that consequence, or that the propter hoc could well be denied; but, however, that may be, the argument did not prevail.

I have thought it necessary to say so much as this as to the case of *Caledonian Railway Co.* v. *Ogilvy* (2), because I am aware, that, to one at least of my noble and learned friends (Lord Blackburn), it appears to present more difficulty than it does to myself. Whether, however, my view of it is correct or not, that case ought not to govern the present; because, here, the respondents' access to and from their property by Canal Street was stopped up and taken away, not from time to time by the use, but once for all by the construction, of the works of the appellants' railway. The respondents' claim is not founded upon a mere liability (whether constant or otherwise) to obstruction, but on obstruction de facto, and that by the works themselves. If, therefore, such an interference with the access to their property by this public street would have been an actionable wrong, if the railway had not been authorized, it is consistent both with *Caledonian Railway Co.* v. *Ogilvy* (2), and with *Hammersmith Railway Co.* v. *Brand* (3), to hold them entitled to compensation under the Acts.

It is however contended, on the authority of *Ricket's Case* (4), that although the respondents' access to Eglinton Street by Canal Street was entirely taken away, that access was not a right so connected with or incident to their real estate fronting on Canal Street as to entitle them to compensation for its loss. It was in *Ricket's Case* (4) that the third of the four propositions, to which I have referred, was established by this House.

(1) Law Rep. 4 H. L. 204.
(2) 2 Macq. 229.
(3) Law Rep. 4 H. L. 171.
(4) Law Rep. 2 H. L. 175.

There is, at first sight, some apparent similitude between the circumstances of *Ricket's Case* (1) and those of the present; but it disappears when the facts of that case and the exact nature of the claim made in it are rightly understood. The facts of *Ricket's Case* (1) as they appear in the appeal papers (to which I have referred) are these: The 'Pickled Egg,' a public-house with a skittle-ground attached to it, of which Mr. Ricket was lessee and occupier, stood on one side of a street or carriage-way in the metropolis called Crawford Street. On the other side of the same street was Clerkenwell Workhouse, a considerable block of buildings, and on the further side of the workhouse another street or carriage-way called Coppice Row, running in a direction which may, for the present purpose, be described as parallel to Crawford Street, of which the line was irregular, and communicating with certain other streets, called Victoria Street and Bowling Green Lane. Between Crawford Street and Coppice Row there was a covered public footway, 76 feet long and 5 feet wide, running out of Crawford Street at a point just opposite to the 'Pickled Egg.' For twenty months, during the construction of the Metropolitan Railway, hoardings were set up by the company by which the carriage roadway of Coppice Row and Bowling Green Lane were obstructed, the foot pavements on both sides of each of those streets remaining without obstruction. The footway leading from Crawford Street to Coppice Row, and its communication with the foot pavement on that side of Coppice Row, were not interfered with: and the company constructed a bridge for foot passengers over the obstructed part of the roadway in Coppice Row, so that foot passengers coming from Crawford Street to Coppice Row or Bowling Green Lane, or vice versâ, might pass by the covered footway, over this bridge, to the foot pavement on either side of Coppice Row, and so to Bowling Green Lane and the other streets leading out of Coppice Row, or thence to Crawford Street. There was, therefore, no obstruction at all which could interfere with the direct access to or from the 'Pickled Egg' by way of Coppice Row and the streets beyond it, for foot passengers; the previous and the only direct access from thence to Coppice Row having been by the covered footway. No claim for compensation was

(1) Law Rep. 2 H. L. 175.

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made on the ground of any actual or supposed interest of the plaintiff Ricket in any of the carriage roadways which were obstructed, or on any other grounds, except the loss of custom to his trade as a publican. He did, indeed, allege in his claim "that his public-house had been injuriously affected," but loss of custom was the only ground stated for that allegation.

The question came before the courts in the form of a special case, in which the effect of the plaintiff's evidence was stated to be "that foot passengers came to his house from Hoxton, Islington, the City Road, Goswell Street, and a variety of places north and east of Coppice Row, from Bowling Green Lane across Coppice Row, and down the covered footway or passage, and persons passed and repassed towards and from Holborn and the places beyond; and that there was no nearer way from Hoxton to the 'Pickled Egg,' and that the principal part of the trade of the public-house was derived from customers attracted to it by a skittle-yard attached thereto, and coming through the said thoroughfare from Bowling Green Lane and passing his house, that immediately after the obstruction the number of foot passengers coming towards the said public-house in manner aforesaid was greatly diminished, and the custom to and trade of the public-house greatly fell off, and did not again improve while the hoarding continued, or after it had been removed; the traffic of the neighbourhood having been entirely altered by the works." The special case stated the question for the opinion of the Court to be "whether the loss of customers by the said Henry Ricket in his said trade, under the above circumstances, was such damage as entitled him to recover compensation from the company? If the Court should be of that opinion, judgment to stand for £100. But if the Court should be of opinion that he was not so entitled," then judgment to be for the defendants.

The opinion of the Court of Queen's Bench entered on the record as the foundation of their judgment for the plaintiff, was that "the loss of customers in the plaintiff's trade," under the circumstances stated, "was such damage as entitled him to recover compensation from the company." That judgment was reversed in the Exchequer Chamber, from which the plaintiff Ricket appealed to your Lordships' House. The ground of the

reversal in the Exchequer Chamber was stated by Lord Chief Justice Erle in the following words :—"Even if the action would lie for this obstruction, whereby the plaintiff was damaged in his trade, still such damage did not accrue to the plaintiff in his capacity of owner of an estate in land . . . . The trading carried on in the house is entirely distinct from the estate in the house." And that learned judge distinguished the case from *Chamberlain* v. *West End of London Railway Co.* (1), in the decision of which against the railway company he had himself concurred. "It is certain," he said, "that the houses themselves of the then plaintiff were found to be injuriously affected, and for that injury alone the compensation was awarded. The principle is, that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from the one to another, and by the circumstance of the highway itself tending to make it useful and agreeable to the occupier of the house." (2)

When *Ricket's Case* (3) came to your Lordships' House the judgment of the Exchequer Chamber was affirmed, Lord Chelmsford and Lord Cranworth concurring in the result, though not in all their reasons. Lord Westbury dissented, calling in question the rule that the words "injuriously affected," in the compensation clauses of the Lands and Railways Clauses Acts, mean only such a technical injuria as would have been actionable if the work had not been authorized by the Legislature. Much of Lord Chelmsford's reasoning was founded upon a distinction between temporary and permanent damage under the 68th section of the Lands Clauses Act, and the 6th and 16th sections of the Railways Clauses Act, in which Lord Cranworth did not concur; and it certainly does not appear to me that the decision of *Ricket's Case* (3), either in this House or in the Exchequer Chamber, can satisfactorily be explained by any such distinction. But both these noble and learned Lords agreed that the damage by loss of custom, of which the plaintiff complained, was a consequence of the works of the railway company, too remote and indefinite to bring it within the scope of any of the compensation clauses of the

(1) 2 B. & S. 617. (2) 5 B. & S. at p. 165.
(3) Law Rep. 2 H. L. 175.

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Acts; and this I consider to have been the true ground of that decision and also of an earlier decision of the Court of Queen's Bench in the case of *Rex* v. *London Dock Company* (1), in which a claim to compensation was made under a special Act, passed before the Consolidation Acts, on similar grounds, and which (in *Ricket's Case* (2)) was referred to with approval by the Lord Chief Justice in the Exchequer Chamber (3) and by both the learned Lords, whose view was adopted by this House (4).

I may add that the same view of *Ricket's Case* (2) was afterwards taken by Willes and Byles, JJ., in the case of *Beckett* (5), where the former of those learned judges spoke of it as deciding that an injury for which compensation is due "must be in respect of the property itself, and not of any particular use to which it may from time to time be put;" and the latter, as proceeding on the ground that the injury was not only temporary but "indirect, and to the trade only."

In the present case, as in *Chamberlain* v. *West End of London Railway Co.* (6) and *Beckett's Case* (5) (both which were approved and followed by this House in *Metropolitan Board of Works* v. *McCarthy* (7)), the claim was made in respect of a direct and immediate injury to the respondents' estate by cutting off their direct and immediate access to Eglinton Street. The circumstances of *Chamberlain's Case* (6) closely resembled those of the present case. In *Beckett's Case* (5) the width of the public road immediately opposite the plaintiff's premises was reduced, so as to render it, not useless to those premises for the purpose of access, but less convenient than before. In *McCarthy's Case* (7) this House gave compensation for the obstruction of access to the River Thames from the plaintiff's premises through a public dock lying on the other side of a public road adjoining those premises.

It was argued for the appellants that these authorities ought not to be extended to any case of the obstruction of access to private property by a public road, when such obstruction is not

(1) 5 Ad. & E. 163.
(2) Law Rep. 2 H. L. 175.
(3) Erle, C.J., 5 B. & S. 168.
(4) Lord Chelmsford and Lord Cranworth.
(5) Law Rep. 3 C. P. 82.
(6) 2 B. & S. 617.
(7) Law Rep. 7 H. L. 243.

immediately ex adverso of the property. This limitation, however, seems to me arbitrary and unreasonable, and not warranted by the facts either of *Chamberlain's* (1) or of *McCarthy's Case* (2). A right of access by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle the owner of that property to compensation for the loss of it; and I apprehend it to be clear that it could not be extended in a case like the present to all the streets in Glasgow through which the respondents might from time to time have occasion to pass for purposes connected with any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinton Street, at a distance of no more than ninety yards, was direct and proximate, and not indirect or remote. The Court of Session has so decided, and I think your Lordships cannot, consistently with your decision in *McCarthy's Case* (2), do otherwise than affirm their judgment. I therefore so move your Lordships.

LORD O'HAGAN:—

My Lords, two questions have arisen in this case. The first, as to the true construction and effect of the letter of the 4th of July, 1873, on the faith of which opposition to the Bill introduced by the railway company was withdrawn, may, I think, be briefly disposed of. It was contended that by that letter the company bound themselves to submit to the arbitrators or the oversman the claims of the petitioners, whatever they might be, which they might think fit to put forward on the allegation that their property had been "injuriously affected" by the making of the railway. I have no doubt that the true meaning of this undertaking was that attached to it by the Lord Ordinary. It could scarcely have been in the contemplation of the parties to have made any demand, however wild, unreasonable, or illegal, the subject of inquiry before arbitrators or a jury. Of course the company might have bound themselves by clear words, for the avoidance of risk or expense, to forego the right of objection even to any such demand; but the words should be very clear to warrant us in attributing to them

(1) 2 B. & S. 617. (2) Law Rep. 7 H. L. 243.

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so improbable a purpose, and should not be strained to justify the imputation of it. The letter seems to me to give no such warrant. It merely provides, in terms, that although no part of the lands of the claimants and petitioners should be taken by the company, they should have all the rights they could have legally enjoyed if it had been otherwise. Larger rights than those given within the operation of the Railway Acts were not conceded to them, and whether, as has been mooted, the undertaking so regarded was of any or of no effect in affording a consideration for the withdrawal of the opposition, it seems to me to have entitled the claimants to nothing more. If within the scope and operation of the statutes, they could establish a claim, it was not to be barred because land was not taken from them; but that claim was not to be extended beyond the limit to which it would have statutably reached if it had been connected with the taking of land.

On the second subject of dispute the cases are not perhaps quite easy of reconcilement, but I think they may be reconciled notwithstanding, and in my opinion the question is settled by the authority of this House. I need not refer in any detail to the circumstances under which the controversy arises; but the oversman or umpire to whom the parties referred their dispute has ascertained facts which must be taken as established, and upon which we must determine whether the claim to compensation, on the ground that the respondents' property has been "injuriously affected" within the meaning of the statutes by the works of the company, has been sustained.

The decreet arbitral conclusively determines that the respondents have suffered and suffered largely from the construction of the railway. It has not taken any of their property, and the injury done to them has not been caused by erections upon any land of theirs or in immediate propinquity with or ex adverso to such land; but it has done them damage by deteriorating the mode of access to it, by obliging them to make a detour of about 265 feet, and by altering the gradients of a street to 1 in 20 for a space of about 116 feet, and 1 in 34·7 for a space of 197 feet. The oversman has found that in these circumstances the claimants' property is, in his opinion, "injuriously affected," and he assesses the damages at the sum of £1500.

On this finding we are warranted in assuming, for the purpose of the argument, that there has been substantial injury, and such an injury as before the enactment of the Railway Statutes would have given the respondents a clear cause of action; that that injury has been done to their estate so as not merely to produce personal or general inconvenience, but by a material operation to diminish the value of it; and that whilst the difficulties of detour and change of gradients may have been unpleasant and mischievous to the public in the neighbourhood of the works, they were specially and particularly injurious to the respondents, so as, in the result, to impose on them a large pecuniary loss.

Taking the facts so found, this case seems to me wholly undistinguishable from that of *Metropolitan Board of Works* v. *McCarthy* (1). I was a party to the judgment in that case, and my reported opinion states, perhaps at more than sufficient length, the grounds on which I thought it sustainable, and I shall not make an idle repetition of the statement of those grounds. I see no reason to alter in any respect the view which I then adopted or the reasons which I urged in support of it; and if it be correct, the respondents are clearly entitled to succeed. In that case, as in this, there was a public way, and in that, as in this, access to it was obstructed by the works complained of. There, as here, the obstruction produced inconvenience to the general public who had the use of the way, but there, as here, there was in addition a particular and appreciable damage to the premises of an individual, rendering them less available for his purposes, and, therefore, diminishing their value. In the language of an old case, he "did necessarily suffer an especial damage more than the rest of the King's subjects": *Iveson* v. *Moore* (2). There, as here, the works which founded the complaint did not infringe upon the premises which they injured; and the makers of them were not held answerable because of any close propinquity or any ex adverso position. Such circumstances were not there held necessary to ground the judgment, as we were pressed to hold them to be here. There, the premises were pronounced to have been "injuriously affected," and the proprietor to have suffered damage to his estate, although no land was taken from him, and although no

(1) Law Rep. 7 H. L. 243. (2) 1 Salk. 15.

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land of his was touched; the physical obstruction of access being deemed in itself an injury to the premises which it damnified, within the meaning of the compensation clauses.

I can recognise no distinction in substance between that case and this, and, if there be none, we are bound to follow it. For my own part, I fully concurred in the decision, and I repeat it cheerfully, for I have never been able to understand the reason why premises should not be held to be "injuriously affected" if they are injured under such circumstances by the construction of a railway so as to be diminished in usefulness and lowered in value, or why, if there be real and appreciable injury, there should not be adequate compensation. The words of the Acts are large enough to accomplish justice as between the company and the claimant, and whilst on the one side the selfishness of private persons should not be permitted to forbid the progress of needful improvements, on the other individuals should not be made to suffer remediless wrong from an overstrained apprehension of the prevention of useful works by the admission of unreasonable claims for compensation. It is desirable that there should not be excess of favour either for the individual interest as antagonising a general benefit or for the promotion of public improvements at the cost of personal injustice.

The rule of action was well stated by Lord Penzance in the case to which I have been referring, he said: "The right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attached to the premises in question, by reason of their proximity to, or relative position with, the highways obstructed, and that this special value has been permanently abridged or destroyed by the obstruction."

As I have felt it improper to repeat the reasons which led me to concur with the judgment of the House in the case of the *Metropolitan Board of Works* v. *McCarthy* (1), so the full discussion which the Lord Chancellor has applied to the other cases cited in the course of the argument, dispenses me from the necessity of dwelling on any of them. I shall only say that some of those cases appear to me equally and wholly undistinguishable from

(1) Law Rep. 7 H. L. 243.

McCarthy's Case (1), and from that with which we are dealing. I do not know that any intelligible distinction has even been suggested as to *Beckett's Case* (2), and *Chamberlain's Case* (3). In the former the narrowing of a highway which permanently damaged the premises of the claimant by obstructing the access to his house, was held to entitle him to compensation; and in the latter, the stopping up of a high road near the complainant's houses, preventing the thoroughfare past them, which theretofore existed, and so producing to him in the words of the Chief Justice, "a particular damnification," sustained his claim. All the elements of the right to damages which those cases present, occur in this, and they have been repeatedly approved in this House.

As to the authorities which have been pressed as countervailing or minimising the force of the decision in *McCarthy's Case* (1)—viz., *Ricket's Case* (4) and *Ogilvy's Case* (5), they seem to me sufficiently distinguished by their diverse circumstances, and the ratio decidendi of the Judges in each of them. In the first, the loss of customers was the gist of the subject-matter of complaint, and it was determined that though the claimant might have been personally injured in that way, he had not suffered from any damage to his house or estate such as would entitle him to compensation. In the second, the crossing on the level, and its consequences by inconvenience, delay, and otherwise, were held not to constitute an injury to the house or land of the complainant; but to be personal to himself, and not to constitute a ground for damages within the provisions of the statutes. Lord Cranworth declared that all attempts at arguing that there was a damage to "the estate," made "a mere play upon words." "It is no damage at all," he said, "to the estate, except that the owner of that estate would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it." And Lord St. Leonards spoke to the same effect, and with equal clearness, he said: "I can see nothing by which this gentleman would sustain damage beyond what everybody else sustained. His estate is not injured."

These passages, and the general tenor of the judgment, seem to

(1) Law Rep. 7 H. L. 243.
(2) Law Rep. 3 C. P. 82.
(3) 2 B. & S. 617.
(4) Law Rep. 2 H. L. 175.
(5) 2 Macq. 229.

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me to have fully justified Lord Chief Justice Erle in *Chamberlain's Case* (1) in affirming, in the Exchequer Chamber, that "the principle of that judgment, in *Ogilvy's Case* (2), was that the respondent was claiming compensation for personal inconvenience or annoyance, and not for injury to his property" (1). Besides, in that case, the injury might have been held to arise from the user rather than the construction of the railway within the principle afterwards established in *Brand's Case* (3), and there was further room for contention, as was expressly noted by Lord St. Leonards, that Mr. Ogilvy had not suffered such special and particular damage as would give him a claim unshared by all the travellers of the neighbourhood, and "the rest of the king's subjects."

As I said in *McCarthy's Case* (4), I should have been disposed, if the matter had been res integra, to doubt whether the statutes were designed to make the possibility of bringing an action, if they had not been passed, essential to ground a claim for compensation; and I should also have doubted whether the injury done to Mr. Ogilvy's house, by diminishing its comfort and convenience and so deteriorating it, was not an injury to his estate in it, warranting a demand against the company. But assuming that the general construction now irrevocably put upon the words "injuriously affecting," and the decision in that particular case, were as correct as they are binding upon us, it seems to me that at least their effect need not be pushed further than is unavoidable, and that the points of distinction to which I have adverted relieve us from any necessity of regarding *Ogilvy's Case* (2) or *Ricket's Case* (5) as inconsistent with *McCarthy's Case* (4), with which that before us appears to me unquestionably identical.

On these grounds I entirely concur with the Lord Chancellor, and I advise your Lordships to affirm the ruling of the Court of Session, and to dismiss the appeal.

LORD BLACKBURN:—

My Lords, the respondents as pursuers below, sought to enforce payment of £1500 awarded to them by the decreet arbitral of the

(1) 2 B. & S. 617.
(2) 2 Macq. 229.
(3) Law Rep. 4 H. L. 171.
(4) Law Rep. 7 H. L. 243.
(5) Law Rep. 2 H. L. 175.

oversman, to whom had been referred a claim for compensation for their lands, situated in the suburbs of Glasgow, on the south side of the Clyde, having been injuriously affected by the exercise of the powers conferred on the then respondents, now appellants, by a special Act which incorporated the Lands Clauses Consolidation (Scotland) Act, 1845, 8 Vict. c. 19, and the Railways Clauses Consolidation (Scotland) Act, 8 & 9 Vict. c. 33.

The findings in the decreet arbitral of the oversman, slightly abridged, are as follows: "I do hereby find (1st) That the claimant's property consists of a plot of ground bounded by Francis Street, sixty feet wide, on the east; by Canal Street, sixty feet wide, on the north; by Victoria Street, sixty feet wide, on the south, and by an unformed street intended to be sixty feet wide, on the west; that the said three first mentioned streets were in the year 1873, and continue to be, public streets. (2nd) That part of the claimants' property was used as a factory, and the rest as dwelling-houses, &c., both let at rents. (3rd) That the claimants have sustained no loss or damage in respect of diminution or reduction of rents since the time the respondents' operations began. (4th) That during the respondents' operations and since their completion, the claimants' property has not by reason of these operations sustained any physical injury in its structure as buildings, or in respect of drainage, light, or air. (5th) That prior to the respondents' operations the claimants had direct, straight, and practically level access, to and from their property from and to Eglinton Street on the east (1st) by Canal Street, and (2nd) by Victoria Street; Eglinton Street then forming (as it does still) a leading thoroughfare from the centre of Glasgow to the south. (6th) That since the respondents' works were executed, and by reason of their execution, the following results have happened: (1st) Canal Street has been shut up as a direct access to Eglinton Street, and in place of that direct access the respondents have formed as a substitute therefor Salkeld Street, a public but a back street of fifty feet wide, running nearly parallel to, and to the west of, Eglinton Street. (2nd) Salkeld Street is not direct or straight, but slightly curved in its formation, and is steeper in its gradients than Eglinton Street, for the corresponding distance between Canal

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Street and Cork Street, the steepest gradient being 1 in 34 as compared with Eglinton Street, the steepest gradient in which within the same distance being 1 in 59. (3rd) For the purposes of traffic carried or going to or from the claimants' property to Glasgow or the north, the detour caused by this substituted street is immaterial, but, taking the west end of Cumberland (1) Street as a common point by Eglinton Street, and by Salkeld Street from Canal Street, the detour or extra distance caused by the respondents' works extends to about 1485 feet, and now applies to all traffic from the claimants' property carried or going eastward along Cumberland Street. (4th) That Victoria Street has not been shut up, but has been slightly diverted, with no appreciable detour, as an access to the claimants' property to or from Eglinton Street and the south, but with a detour or extra distance caused by the respondents' works of about 265 feet which now applies to all traffic carried or going by Eglinton Street to the north, and the diversion of Victoria Street, and the building of a bridge over their railway by the respondents, have had the effect of altering the gradient of a street formerly almost level to 1 in 20 for a space of about 116 feet, and 1 in 34·7 for a space of about 197 feet. (7th) That the new substituted access by Salkeld Street forms, in conjunction with Canal Street, Cork Street, and Victoria Street, the principal access to Eglinton Street for the claimants' property and the other properties situated in the same locality, including the Joint Line Railway station and the Canal Basin. (8th) That, in these circumstances, and having regard to the facts and circumstances proved, the claimants' property is, in my opinion, injuriously affected by the construction of the respondents' works, and, on the assumption that the claimants are legally entitled to be compensated by the respondents for the injury so caused, I fix and assess the pecuniary amount of this compensation at the sum of £1500 sterling, whereof I allocate the sum of £1200 as applicable to compensation for damage by detour, and the sum of £300 to compensation for damage by change of gradients."

It is not disputed that the oversman had before him evidence to justify his findings of fact, and that being so, we must, I appre-

(1) Cumberland Street lies on the east side of Eglinton Street.

hend, accept his findings as true and that the pursuers have, in fact, sustained substantial and appreciable loss from the works of the appellants, not touching their land, but altering the mode of access to it by public ways, so as to compel those occupying their lands when going in certain directions, not in all, to use a longer road than before, or as it is phrased, to make a detour, and also when going in certain directions, not in all, to use a road less commodious because steeper than before, or, as it is phrased, by change of gradients; and the question of law arises whether the pursuers are entitled to compensation for those two heads of damage.

Some things, I think, are now no longer open to discussion. No action can be maintained for anything which is done under the authority of the Legislature, though the Act is one which if unauthorized by the Legislature, would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the Legislature has thought fit to give him (see *Hammersmith Railway Co.* v. *Brand* (1)). The Lands and Railways Clauses Acts of 1845 give some compensation. I do not think that there is in this respect any difference between the legislation for England and for Scotland. And it must now be considered settled that on the construction of these Acts, compensation is confined to damage arising from that which would, if done without authority from the Legislature, have given rise to a cause of action.

Lord Westbury strongly held and expressed an opinion that this was too narrow a construction of the statutes; but in *Duke of Buccleuch* v. *Metropolitan Board of Works* (2) he admitted that what he thought the wrong construction was put upon the statutes by this House. And it must, I think, also be now considered as settled that the construction of those statutes is confined to giving compensation for an injury to land or an interest in land; that it is not enough to shew that an action would have lain for what was done if unauthorized, but it must also be shewn that it would have lain in respect of an injury to the land or an interest in land.

The pursuers in the present case rested their claim on two

(1) Law Rep. 4 H. L. 171. (2) Law Rep. 5 H. L. at p. 461.

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grounds:—Firstly, that compensation was given by the statutes for such damage as the oversman had found to exist in fact. The Court of Session have based their judgment in their favour on this ground, and I have come to the conclusion that they were right. Secondly, that there was a special agreement between the pursuers and the respondents below, under which the pursuers were entitled to compensation, even if the construction of the statutes was adverse to them. The Court of Session did not decide this, but intimated an inclination of opinion favourable to the pursuers. This question is not likely ever again to arise; but my impression is against the pursuers on this ground. I do not, however, think it necessary finally to form an opinion on this. I shall confine my remarks exclusively to the first question, which depends upon the true construction of the statutes of 1845.

There have been many decisions on those statutes. I shall think it proper to refer to five in this House, which it is certainly not easy, and to my mind it is not possible, altogether to reconcile. I shall not examine the decisions in the Courts below, except where it is necessary in order to understand those in this House. The first in point of date is *Caledonian Railway Co.* v. *Ogilvy* (1) decided in this House in 1856. It was on this decision that the appellants' counsel principally relied. In *Caledonian Railway Co.* v. *Ogilvy* (1) the claim of the respondent, pursuer below, for compensation had been tried before the sheriff. The jury had, under the direction of the sheriff, given a verdict assessing compensation, amongst other things "for £560 in respect of severance and level crossing," but without distinguishing how much had been assessed for the severance, and how much for the level crossing. The Court of Session had given judgment for the landowner. This judgment was reversed.

The Lord Chancellor (Cranworth) expresses great embarrassment as to the mode in which the question was raised, but includes that there was nothing to prevent the House "from deciding, first, that the sheriff first and the Court of Session afterwards have fallen into an error in supposing that this level crossing was a subject for compensation at all; that it is a damnum

(1) 2 Macq. 229.

sine injuria; that so the sheriff ought to have told the jury; that the verdict on the face of it is bad, is a verdict which cannot stand, but which ought to be overturned; and that the interlocutor of the Court of Session ought to be reversed."

Since the decision of this case it has, after a great diversity of judicial opinion, been finally decided in *Hammersmith Railway Co.* v. *Brand* (1) by a majority of this House (Lord Cairns dissenting), that the legislation of 1845 did not give a right to compensation for any damage to lands arising from the authorized use of locomotives on the railway; though it took away the owner's right of action for such damage. And, as I think, it cannot be denied that much the greater part of the damage occasioned by a level crossing, certainly the greater part of what was claimed in *Caledonian Railway Co.* v. *Ogilvy* (2) arises only from the use of the railway. If no trains ran on a line there would still be the inconvenience that carriages would cross rails laid over the road. It might well have been said that the damage occasioned by that was inappreciable; or at all events that the sheriff should have directed the jury to assess no more compensation than was due to this, excluding that on which the pursuer mainly relied, viz., the danger and annoyance to nervous persons from the passing trains.

But though there are some expressions in the opinions both of the Lord Chancellor (Cranworth) and of Lord St. Leonards that seem to shew that an idea somewhat akin to this was in their minds, I do not think either makes it the ground of his judgment. And it was not till 1869, thirteen years after *Caledonian Railway Co.* v. *Ogilvy* (2) was decided, that it was decided in *Hammersmith Railway Co.* v. *Brand* (1) that, on the true construction of the Acts, no compensation was given in such a case, and I cannot find that it was suggested by any one in the discussion of that case that *Caledonian Railway Co.* v. *Ogilvy* (2) was an authority in favour of the view which ultimately prevailed.

I think the ground on which both the Lord Chancellor (Cranworth) and Lord St. Leonards decided in *Caledonian Railway Co.* v. *Ogilvy* (2) was that no compensation is given for damage occasioned by the works of the company, if the thing done was one

(1) Law Rep. 4 H. L. 171. (2) 2 Macq. 229.

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for which, if done without any statutable powers, no action could have been maintained, however certain it may seem that it would never have been done but for the creation of the company, which, notwithstanding Lord Westbury's strong opposition, is, I think, now settled to be correct law. Next, that though an action would have lain for the thing done, yet no compensation is given, unless the ground of action would be that lands, or some interest in lands, was injuriously affected, which also is, I think, now settled law, and they thought that the pursuer could not have maintained an action at all, or, if he could, that it would have been an action in respect of personal loss or inconvenience, and not an action in respect of an injurious affection of his land or house.

Lord Cranworth, in *Ricket* v. *Metropolitan Railway Co.* (1) in 1867, repeated more deliberately in what was evidently a written opinion what he had verbally said in *Caledonian Railway Co.* v. *Ogilvy* (2) in 1856. He there says, "Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in contemplation of the Legislature."

It was not, and I think could not successfully have been, disputed at the Bar that if this passage is a correct statement of the law, the decision now appealed against could not be supported. And if there had been no subsequent decisions on this point, I should have felt very great difficulty in refusing to follow what I think was the decision of this House in *Caledonian Railway Co.* v. *Ogilvy* (2), even if convinced it was a mistake. But there have been many decisions since 1856, four of them being decisions of this House. There had been, after *Caledonian Railway Co.* v. *Ogilvy* (2), a decision of the English Court of Exchequer Chamber

(1) Law Rep. 2 H. L. 175, at p. 198. (2) 2 Macq. 229.

in *Chamberlain* v. *West End of London Railway Co.* (1), which it is not easy to reconcile with what I think was the view of the law taken in *Caledonian Railway Co.* v. *Ogilvy* (2). The next case in this House was *Ricket* v. *Metropolitan Railway Co.* (3), in 1867. The Lord Chancellor (Chelmsford) agreed in the result with Lord Cranworth, but gave a long judgment which, as he afterwards explained it in *Metropolitan Board of Works* v. *McCarthy* (4), however much it may have been misunderstood, was not intended to express an agreement in the passage I have just read, saying (page 259), that in *Ricket's Case* (3) there was no finding which related to the premises, but merely of personal damage; and Lord Westbury dissented from that judgment altogether. The House in coming to this decision can hardly perhaps be said to depart from what I understand to have been the view of the law taken in *Caledonian Railway Co.* v. *Ogilvy* (2), but it gives it no additional authority.

The next case which came before this House was that of *Duke of Buccleuch* v. *Metropolitan Board of Works* (5) in 1872. The question in that case was so complicated with others, that I have great doubts whether it can properly be said that this House decided anything on the point now before us, though Lord Cairns in his opinion distinctly enough shewed what his view of the law was.

And then, in 1874, came the case of *Metropolitan Board of Works* v. *McCarthy* (4), on which the respondents both below and at your Lordships' Bar principally relied. In that case the Lord Chancellor (Cairns) said (at page 252), "Now, my Lords, divesting the present case of the more precise description which I have read from the case, it appears to me to amount to this. The occupier or tenant of a house has got in front of his house two highways, the one highway being a road or street, and the other immediately beyond or abutting upon the road or street being a highway by water. The highway by water is taken away from him, the highway by land remains. It appears to me that it is impossible to doubt that the destruction of the highway by

(1) 2 B. & S. 617.
(2) 2 Macq. 229.
(3) Law Rep. 2 H. L. 175.
(4) Law Rep. 7 H. L. 243.
(5) Law Rep. 5 H. L. 418.

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water, situate as I have described it, is otherwise than a permanent injury to the property in question by whomsoever or for whatsoever purpose that property may be occupied. The case appears to me to be extremely analogous to a case decided by the Court of Common Pleas before the present case, the case of *Beckett* v. *Midland Railway Co.* (1), in which there was in front of the premises in question in that case one single highway, the farther half or the farther third portion of which was taken off and blocked up by the execution of the defendant company's works. It was there held that that was an injury which permanently and injuriously affected the premises in question, and it appears to me to be a matter entirely indifferent, whether you have one highway, the farther half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and part of the highway which consists of water is blocked up and destroyed. My Lords, in his very able argument at your Lordships' Bar, Mr. Thesiger stated what he would rely upon as a definition of the right to compensation; and having considered this case very fully, I myself should not be disposed to find fault with any part of that definition, although definitions are always matters of very considerable difficulty. Mr. Thesiger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if, by reason of such interference, the property as a property is lessened in value."

I have read this part of the judgment at length from which I think it sufficiently appears, that the judgment did not proceed on the ground that the obstruction to the water highway was opposite to the plaintiff's premises, but this appears more clearly by a reference to the case at large which shews that the damage was all occasioned by making the embankment across the mouth

(1) Law Rep. 3 C. P. 82.

of the drawdock, more than 400 feet from the plaintiff's premises, and so cutting him off from the Thames. Probably when that was done, the rest of the drawdock now rendered useless was filled up, though that is not stated in the case, but whether it was filled up or not, the damage to McCarthy's premises would be the same.

Lord Chelmsford, as I have already said, explained his judgment in *Ricket* v. *Metropolitan Railway Co.* (1), as proceeding on the ground that the damage there claimed was merely a personal damage, and that he meant to affirm the decision in *Chamberlain* v. *West of London Railway Co.* (2). At the same time he certainly treats *Caledonian Railway Co.* v. *Ogilvy* (3) as rightly decided.

I do not think it necessary to read any part of the opinions of Lords Hatherley, Penzance, and O'Hagan, who all agreed in the result. I think this decides that the right of access by a public way to land is a right attached to the land, and that if an obstruction to the public right of way occasions particular damage to the owner or occupier of that land by diminishing its value, the action which he might bring for that particular damage would be an action for an injury in respect of the land; and that is in direct conflict with what I understood to have been the ground of the decision in *Caledonian Railway Co.* v. *Ogilvy* (3). It certainly seems to me that if it be conceded that the oversman had before him materials on which he could legitimately find the facts which he has found, the present case is undistinguishable from that of *Metropolitan Board of Works* v. *McCarthy* (4).

Now I do not dispute that an obstruction to a highway may be so distant from lands, that no one could reasonably find that the lands were appreciably damaged by the obstruction, but I think it unnecessary to try to give a definition of that distance. It is enough to say that in this case the distance is not too great.

I have only further to notice the decision of this House in *Lyon* v. *Fishmongers' Company* (5). The question there was on a different statute, but I think the decision much in point. By the

(1) Law Rep. 2 H. L. 175.
(2) 2 B. & S. 617.
(3) 2 Macq. 229.
(4) Law Rep. 7 H. L. 243.
(5) 1 App. Cas. 662.

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Thames Conservancy Act (20 & 21 Vict. c. 147), s. 53, powers were conferred upon the Conservators of the Thames to license any owner or occupier of land to make any work immediately in front of his land, and into the body of the river. No compensation was given by that Act, but sect. 179 provided, that nothing in the Act should extend to take away or abridge any right to which any owner or occupier of land upon the banks of the river are now by law entitled.

The question raised was, whether the right which Lyon, as owner of a wharf, had of access to the river on the side of his wharf, as well as in front of it, was a right saved by this 179th section, so as to entitle him to an injunction against an obstruction to it authorized by a license granted under sect. 53. The Court of Appeal had decided that it was not.

Lord Justice Mellish in delivering the judgment says (1), that it was agreed and could not be disputed that if such an embankment as that proposed were made without the authority of Parliament, the plaintiff would have a remedy by action at law, or by suit in equity, but the difference was as to what would be the ground of the action or the suit. It is singular that though *Caledonian Railway Co.* v. *Ogilvy* (2), and *Metropolitan Board of Works* v. *McCarthy* (3), had it appears, been cited and relied on by the counsel for the plaintiffs, Lord Justice Mellish does not seem to have appreciated their importance as bearing on this question; at least he takes no notice of these cases. He proceeds to say (4): "A man having a mere right of way, the narrowest possible, down to the water edge, has as much right as the owner of the most extensive riparian property to the reasonable use of any portion of the navigable river for the purpose of loading or unloading goods or embarking or disembarking passengers; and if a public way went down to the water edge, any one of the public using that would have the same right of using the stream. The right to stop a carriage or waggon on the highway for the purpose of loading or unloading is not limited to, and has no necessary connection with, frontage, e.g., the occupier of a back workshop has exactly the same rights as the shopkeeper in front." He comes to

(1) Law Rep. 10 Ch. Ap. at p. 688.
(2) 2 Macq. 229.
(3) Law Rep. 7 H. L. 243.
(4) Law Rep. 10 Ch. at p. 390.

this conclusion:—"On the whole, we are of opinion that the right of a wharfinger to bring an action or file a bill on account of an obstruction in the river which renders the access to his wharf less convenient, and his right to bring an action or suit on account of obstruction in the river which deprives him of all access to his wharf, depend on the same legal principles, namely that he suffers a particular damage from a public nuisance, and that in neither case is there a violation of any private right of his, distinct from the public right of navigation which is in all the Queen's subjects."

Had this stood unreversed, I should have thought it a very weighty authority, in confirmation of what I think was the opinion of Lord Chancellor Cranworth and Lord St. Leonards in *Caledonian Railway Co.* v. *Ogilvy* (1). But it was reversed by the unanimous opinion of the House of Lords, the Lord Chancellor (Cairns) saying it was decided by this House in *Duke of Buccleuch* v. *Metropolitan Board of Works* (2) and *Metropolitan Board of Works* v. *McCarthy* (3), that when the public right is connected with access to a particular wharf, it becomes "a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an injurious affection of the land, that is to say, the occasion ing to the land of an injuria or infringement of the right." Lord Chelmsford says, "When this House decided, in the above cases, that the owners of land on the rivers were injuriously affected by having their access to the river cut off, as the test of such injury was the right to maintain an action if no statutory powers had been granted, the decisions are directly opposed to the judgment of the Lords Justices, and if they had considered them, must, I venture to think, have led them to a different conclusion."

Both these noble and learned Lords had been parties to the decision of *Metropolitan Board of Works* v. *McCarthy* (3), and their opinions in this case shew how they understood their own decisions. Lord Selborne had not, so far as I know, been a party to any previous decision. But he now very clearly states the point on which there is a difference between the view of the law taken by this House in *Metropolitan Board of Works* v.

(1) 2 Macq. 229. (2) Law Rep. 5 H. L. 418.
(3) Law Rep. 7 H. L. 243.

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McCarthy (1), and that taken by Lord Cranworth certainly, and I think by this House in *Caledonian Railway Co.* v. *Ogilvy* (2). He says, "It was admitted that if the case had been for compensation under the Lands Clauses Acts, the land of the riparian proprietor would, by the deprivation of this water frontage, be injuriously affected. But, unless this was an interference with some right or privilege recognised by law as belonging or incident to land, it would be no actionable wrong as an injury to the land, although not authorized by Parliament, and in that case the land would not be injuriously affected. If, on the other hand it is an interference with a right or privilege recognised by law as belonging to the land, that right or privilege is certainly not identical with the public right of navigation."

This seems to me a direct decision, both that an action for such particular damage as the deterioration of land from the obstruction of a public way is an action for an infringement of a right attached to the land; and also, that this was deliberately determined to have been the ratio decidendi of this House in *Metropolitan Board of Works* v. *McCarthy* (1). If this is in conflict with the previous decision in *Caledonian Railway Co.* v. *Ogilvy* (2), and in candour, I must admit that I think it is, I think we ought to follow the later and more deliberate decision. In this case, if I were forming a judgment independent of the authority of this House, I should come to the same conclusion; but I prefer to base my judgment on the authority of the later decisions.

LORD WATSON, having stated the facts, proceeded:—

My Lords, the award of the arbiter cannot receive effect, if, in these circumstances, the respondents' property has not been "injuriously affected" within the meaning of the Lands Clauses Consolidation (Scotland) Act of 1845. The words "injuriously affected" must have precisely the same meaning in the Scotch Act as in the similar statute passed for England in that year; and, in my opinion, the present case is within the principle established by the judgment of this House upon the construction of the English Act, in *Metropolitan Board of Works* v. *McCarthy* (1).

(1) Law Rep. 7 H. L. 243. (2) 2 Macq. 229.

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In *McCarthy's Case* (1), the Lord Chancellor (Earl Cairns) said: "The proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorized by Act of Parliament. I do not pause to consider whether or not, if the question was now to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down, and which has formed the foundation for the decision of so many cases before the present." The rule was stated, in similar language, by Lord Hatherley and Lord Penzance; and it appears to have been accepted by the other noble and learned Lords who took part in the decision of the cause.

The rule thus formulated does not apply with precision to the law of Scotland, which does not, in cases like the present, recognise that distinction between the remedies of action and indictment, upon which the test is founded. But that which satisfies the test, that which gives a right of action in England, has been defined in the case of *McCarthy* as well as in previous decisions. When an access to private property by a public highway is interfered with, the owner can have no action of damages for any personal inconvenience which he may suffer, in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, be so dependent upon the existence of that access as to be substantially diminished by its obstruction, then I conceive that the owner has, in respect of any works causing such obstruction, a right of action, if these works are unauthorized by Act of Parliament, and a title to compensation under the Railway Acts, if they are constructed under statutory powers.

The facts of the present case appear to me so clearly to bring it within the rule thus explained, that I consider it quite unnecessary to institute a minute comparison between these, and the circumstances in which McCarthy's property was held to have been injuriously effected. Indeed, the similarity, if not identity of the two cases was so apparent that the argument, by which the able counsel for the appellants sought to distinguish the present from *McCarthy's Case* (1) mainly consisted in an endeavour to shew

(1) Law Rep. 7 H. L. 243.

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that there were certain physical conditions attaching to the rule laid down in that case by the House. These conditions were that in order to found a claim of compensation, the works causing obstructing to access must be in proximity to, and also ex adverso of the property alleged to be injuriously affected.

I cannot find a single word in the opinion of the noble and learned Lords who decided *McCarthy's Case* (1), or anything in the facts of that case, capable of giving a colour to the appellants' contention. In point of fact, the appellants' works obstructing Canal Street and Victoria Street, are less than 100 yards from the respondents' property, whereas the works of the Metropolitan Board, by which his access to the Thames was cut off, were upwards of 120 yards distant from, and were in no reasonable sense ex adverso of, Mr. McCarthy's premises. Probably the dock, which came to within twenty feet of the premises, would be discontinued after it ceased to have communication with the river; but it seems plainly to follow from the judgments delivered in that case, that if McCarthy's access, instead of being wholly cut off by the river wall which the Board erected, had been made so inconvenient that the value of his premises was in consequence materially lessened, he would still have had a good title to compensation.

It was also maintained by the appellants that the present case is ruled by the decision of the House in *Caledonian Railway Co.* v. *Ogilvy* (2); and that the injury sustained by the respondents must therefore be held to be of the same kind as the personal inconvenience experienced in a greater or lesser degree by all members of the public who may have occasion to use the streets in question.

The claim which, in *Ogilvy's Case* (2), had been affirmed by a jury, was for compensation in respect of injury to the claimant's mansion-house and policy, by reason of the railway crossing upon the level a public road which formed the main access to the claimant's avenue; it being also alleged, in the claim, that the injury was aggravated by certain inconveniences which were plainly attributable, not to the construction of the railway, but to its use. It was not alleged that there was any peculiarity in the

(1) Law Rep. 7 H. L. 243. (2) 2 Macq. 229.

construction of the level crossing which per se occasioned inconvenience to the occupants of the claimant's property. The two noble and learned Lords by whom the case was decided, agreed in opinion that the verdict could not stand, inasmuch as the claim disclosed matters amounting to personal inconvenience, but which did not injuriously affect the claimant's property. It does not admit of dispute that the judgment agrees, in its result, with subsequent decisions of the House, so far as concerns those elements of the claim which were derived from "the passing and noise of the engines and trains;" and since the case of *Brand* (1), these would be rejected, not as being matters of personal inconvenience merely, but as matters, in respect of which, however injurious to property they might be, all claim for compensation has been excluded by the policy of the Railway Acts.

That being so, it was impossible that the claim, as made, or the verdict following upon it, could be sustained in law, but as I understand their judgments, both of the noble and learned Lords dealt with the claim as in substance a claim in respect of injury to property arising from the proximity of a level crossing, and treated the inconveniences resulting from the use of the railway as incidents of that claim; and it appears to me that their Lordships intended to decide that in that case, at all events, the mansion-house and policy of the claimant, could not be "injuriously affected," by the mere fact of the railway crossing, upon the level, the public road which formed the main access to the house and policy.

The present case does not involve any question of level crossings, nor are any of the inconveniences, for which the arbiter has awarded compensation, due to the uses which the appellants make of their line. The judgment in *Ogilvy's Case* (2), whatever view may be taken of it, has, in my opinion, no real bearing upon the questions raised in this appeal; and I therefore do not express any opinion upon the question, which was raised in the argument, whether *Ogilvy's Case* (2) and *McCarthy's Case* (3) are or are not in all respects reconcileable. I am not prepared to say that they

(1) Law Rep. 4 H. L. 171. (2) 2 Macq. 229.
(3) Law Rep. 7 H. L. 243.

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are not. On the other hand were a jury or arbiters to find that, apart from all inconveniences arising from use of the railway, the selling value of a house was depreciated to the extent of £50, or a £100, by the formation of a level crossing upon a highway affording access to it, I am not, at this moment, prepared to hold that it would be consistent with the principle of *McCarthy's Case* (1) to deny effect to that finding.

I have nothing to add to what has been said by your Lordships in regard to the construction of the undertaking given to the respondents in consideration of their withdrawing their opposition to the Bill promoted by the appellants.

I am accordingly of opinion that the interlocutors under appeal ought to be affirmed.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 29th March, 1882.

Agents for appellants: *Grahames, Wardlaw, & Currey.*
Agents for respondents: *Martin & Leslie.*

(1) Law Rep. 7 H. L. 243.

[PRIVY COUNCIL.]

MELBOURNE BANKING CORPORATION, LIMITED . . . . . } DEFENDANTS;

AND

JOHN BROUGHAM . . . . . PLAINTIFF.

J. C.*
1882
Feb. 28;
March 8, 11.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Suit to set aside Release of Equity of Redemption—Misrepresentation—Onus Probandi.

In a suit by the respondent (lately an insolvent) to set aside on the ground of misrepresentation or mutual mistake a release by the official assignee of the respondent's equity of redemption of a certain mortgage, for accounts against the appellants, the mortgagees, and in effect to have the benefit of a subsequent resale by the relcasee's purchaser, it appeared that the official assignee had in the release admitted the truth of the representations made to him, and that the respondent had thereafter taken a conveyance from him of all the estate vested in him under the insolvency:—

Held, that the onus was upon the respondent, who was primâ facie bound by the admissions under seal of his vendor, to prove the falsehood of the representations, and not upon the appellants to establish their truth.

Held, further, that where a mortgagor in consideration of the mortgage debt releases the equity of redemption to the mortgagee, the parties should be regarded, until the contrary is shewn by the party impeaching the deed, as on the ordinary footing of vendor and purchaser.

Knight v. *Marjoribanks* (1) approved.

If such release is voidable an equity to set it aside is an equitable interest in the property to which it relates, and therefore in this case was part of the estate vested in the official assignee. The respondent, under his conveyance from the official assignee, obtained a locus standi to maintain this suit.

APPEAL from a decree of the Supreme Court of the Colony of Victoria made by Molesworth, J. (Nov. 16, 1880), whereby he declared that the equity of redemption in certain stations and stock which had been mortgaged by the respondent to the appellants was not barred by a release of the equity of redemption

* *Present*:—THE LORD CHANCELLOR (LORD SELBORNE), SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 2 Mac. & G. 10.

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executed by Goodman, the official assignee of the respondent (who was the insolvent), in favour of the appellants, and that the said equity of redemption was effectually conveyed to the respondent by a conveyance of all his estate executed by Goodman's successor.

The main question decided in the appeal was whether the release by Goodman to the appellants was valid and effectual. A subsidiary question was whether, if it were voidable, an equity to set it aside had passed to the respondent under the conveyance from Goodman's successor.

The facts of the case, and the proceedings in the suit, appear in their Lordships' judgment and in a former report: see 4 App. Cas. 156. For the report of the case in the Court below see 6 Vict. L. R. Eq. 214.

Davey, Q.C., and *J. D. Wood*, for the appellants, contended that upon the pleadings and under the circumstances of the case, especially having regard to the fact that the respondent was bound by Goodman's admissions under seal, the onus of proving the falsity of the representations made lay upon the respondent, and not the onus of proving their correctness on the appellants. In other words, it was not on the bank in this suit to prove what was the amount due on the mortgage, or the value of the mortgaged property, at the time of the release of the equity of redemption. Second, the representation made by the bank was not one on which the respondent was entitled to act, as it was only of the value which the bank put on the property. Third, there was no evidence of either error or misrepresentation. The amount due exceeded the amount stated. Fourth, the Judge was in error in holding that the consideration for the release of the 30th of May, 1870, was not proved. The bank was precluded by the release from proving in the insolvency. The release was accepted in satisfaction of the original debt, and necessarily extinguished it, even as regards a mesne incumbrancer. It imported a covenant by the purchaser to indemnify the vendor against the mortgage debt: see *Waring* v. *Ward* (1), Sugden's Vendors and Purchasers [11th ed.] 218, [14th ed.] 198, and *Adams* v. *Angell* (2).

(1) 7 Ves. 332, 336.

(2) 5 Ch. D. 634.

Even in the case of foreclosure in invitum, the debt is practically extinguished so long as the foreclosure lasts. The mortgagee may sue for the mortgage debt, but if he does he thereby opens the foreclosure and revives the equity of redemption which had been foreclosed. A foreclosure by contract is still stronger, and a mortgagee who cannot reopen it cannot sue for the mortgage debt. [THE LORD CHANCELLOR:—Besides, the deed expresses the release to be for £18,900 due and owing. How can a man sue to recover back part of the consideration money which he has paid?] Even if the deed were a voidable one, see *Stump* v. *Gaby* (1) as to the right to set it aside.

Further, the conveyance by Goodman's successor to the respondent did not pass such an interest in the estate in suit as to entitle the respondent to bring this suit. The right to set aside an executed contract cannot be deemed to have passed by a general assignment.

Benjamin, Q.C., and *Everitt*, Q.C., for the respondent, contended that the release was voidable on the ground of misrepresentation by the bank, or mutual mistake of the bank and Goodman, and ought to be set aside, together with the sale made subsequently to it. The evidence shewed misrepresentations as to the amount due, and the value of the mortgaged premises. [SIR ARTHUR HOBHOUSE:—As to this latter point, ought not the subject of imputed misrepresentation to be a matter of fact peculiarly within the knowledge of the party making it, and not a mere matter of opinion?] See *Redgrave* v. *Hurd* (2). If the substance of the letters of the bank's solicitor was a representation to induce Goodman to act, it is immaterial that it was not fraudulent. Further, Goodman was a trustee for the insolvent and his creditors; and if a trustee sells under circumstances which do not secure the best price the Court has interfered, assuming that the facts which constitute the default of the trustee are known to the purchaser. [THE LORD CHANCELLOR:—Your bill is framed on misrepresentation by the appellants. Can you now set up the case of their being privy to a breach of trust, and is the bank taking a release from Goodman in a different position from the

(1) 2 De G. M. & G. 623. (2) 20 Ch. D. 1; 45 L. T. (N.S.) 485.

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bank taking a release from the mortgagor?] *Webb* v. *Rorke* (1); *Ford* v. *Olden* (2). [THE LORD CHANCELLOR referred to *Knight* v. *Marjoribanks* (3).] *Dance* v. *Goldingham* (4). [THE LORD CHANCELLOR:—That was a suit to restrain completion of a purchase, and there was a breach of trust.] The representations here were accepted improvidently. If either of them was incorrect the transaction cannot stand. As to the respondent's title to sue, see *Troup* v. *Ricardo* (5).

The counsel for the appellant were not called on for reply.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Lord *Selborne*):—

This is an appeal from a decree of the Supreme Court of Victoria, setting aside a deed of release of the equity of redemption of a sheep station called "Alma" in that colony, which was mortgaged by the respondent, John Brougham, to the appellants on the 18th of May, 1867, to secure a loan of £8349. 15*s*. then made to him, with interest and future advances. The appellants were in possession from April, 1868, and executed fencing works and other improvements on the station. Brougham became bankrupt on the 26th of January, 1870; and one John Goodman was appointed official assignee of his estate under the insolvent law of the colony. The release of the equity of redemption, set aside by the Court below, was executed by Goodman to the Appellants on the 30th of May, 1870, in consideration of the full amount of the debt then claimed by the appellants as due on their security, which is stated in the deed at £18,900 or thereabouts.

The respondent obtained his certificate three days after the date of this deed. On the 28th of May, 1871, the appellants sold the station to one Thomas James for £21,000, payable by instalments extending over three years. On the 13th of December, 1873, the respondent, according to his own statement, became aware of the release of the equity of redemption executed by Goodman to the appellants: and he then contracted with Good-

(1) 2 Sch. & Lef. 673.
(2) Law Rep. 3 Eq. 461.
(3) 2 Mac. & G. 10.
(4) Law Rep. 8 Ch. Ap. 902.
(5) 4 De G. J. & S. 489.

man to purchase all the interest in his own estate, then remaining vested in Goodman, for £20. Nothing was done on the footing of this contract till March, 1877. In the meantime (on the 16th of April, 1874) Goodman died; and it is stated in the judgment appealed from that in May, 1876, the station was re-sold by James and one Johnson (whom he had associated with himself as a partner) for £80,000. On the 28th of February, 1877, a person named Jacomb was appointed official assignee in place of Goodman; and he, two days afterwards, in fulfilment of Goodman's contract with the respondent, conveyed to the respondent all the estate then vested in him under the insolvency.

It was contended at the bar that this conveyance was not sufficient to enable the respondent to institute a suit to set aside the release of May, 1870, from Goodman to the appellants; but if that release was voidable in equity, it is clear, both on principle and on authority, that there was an equitable interest in the Alma station, which, in 1877, continued to be part of the estate vested in the official assignee, and that the deed executed by Jacomb was sufficient to pass that interest. Their Lordships, therefore, do not doubt that the respondent, when he instituted this suit, had the same locus standi in curiâ which Jacomb would have had if the deed of the 2nd of March, 1877, had not been executed; and they regard the time at which, and the circumstances under which, the respondent took his conveyance from Jacomb as material only to the burden of proof, properly incumbent upon the respondent, as plaintiff in a suit by which a deed, duly executed for valuable consideration, is sought to be impeached on equitable grounds. At the best, the respondent can only stand in the shoes of Goodman, and he must have knowledge of the release which he seeks to set aside imputed to him, at least from the time when he admits that he acquired it.

This suit was instituted on the 22nd of June, 1877, by a bill which prayed for accounts against the appellants as mortgagees in possession; objecting to the sale to James and seeking (in effect) to have the benefit of the subsequent re-sale. The release of May, 1870, was not mentioned in the bill, as originally framed, except as a defence expected to be set up by the appellants; and nothing was then alleged to impeach it, beyond a suggestion that

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Goodman, as official assignee, had no power or authority to execute such a release, and that it was void and of no effect as against the plaintiff.

To this bill the defendants pleaded the release of the 30th of May, 1870; but that plea was overruled by the colonial Courts on the ground that it was ultrà vires of the official assignee to execute any such release. The orders overruling the plea were reversed on appeal by Her Majesty in Council, their Lordships giving the parties liberty to make such additions to and amendments of their pleadings as they might be advised; and intimating that if the agreement and release stated in the plea were not the result of a fair and honest accounting and bargain, or were impeachable on the grounds of mistake or flagrant error, or of fraud upon the official assignee, or collusion between him and the bank to cheat the creditors, they might be questioned by proceedings proper for that purpose (1).

The respondent thereupon amended his bill, charging that the debt due by the plaintiff to the defendants on the 30th of May, 1870, did not amount to the sum of £18,900 or thereabouts, but to a much smaller sum, and that the value of the station property at that time was at least £25,000 or thereabouts, and that the deed of the 30th of May, 1870, was not the result of, or made and executed in pursuance of, any fair and honest accounting or bargaining between the appellants and Goodman, but that, on the contrary, Goodman was induced to make and execute that deed by the misrepresentations of the appellants and the other defendant Johnson (their manager), as to the amount of the debt then alleged to be due and owing by the plaintiff to the appellants, and as to the value of the station property; and that Goodman made and executed the deed relying on those misrepresentations, and not otherwise, and under mistake, believing the false representations so alleged to be made to be true; and that, if the appellants believed their own representations to be true, the deed was executed under a mutual mistake, and, if they did not, was obtained by fraud and misrepresentation on the part of the appellants. These were the grounds suggested in the amended bill for setting aside that deed. An answer to the bill, as so

(1) 4 App. Cas. 164.

amended, was put in by the appellants on the 25th of April, 1880, in which all these allegations were denied, and which concluded by submitting to the Court that the plaintiff was not entitled to have any account taken of the mortgage debt due to the appellants on the 30th of May, 1870, as all accounts of the appellants in relation thereto had on that date been stated and settled between the appellants and Goodman; and the appellants thereby claimed the benefit of the deed of the 30th of May, 1870, as a settled account, as if it had been pleaded as such to the relief sought by the amended bill.

Evidence was taken on both sides; and on the 25th of February, 1881, Mr. Justice Molesworth made a decree in the respondent's favour; declaring that the equity of redemption of the mortgage of the 18th of May, 1867, was not barred by the release of the 30th of May, 1870; and directing against the appellants, as mortgagees in possession, the accounts which that learned Judge thought properly consequential, under the circumstances, on that declaration. The present appeal is from that decree. The learned judge, in the reasons given by him for this decree, stated his opinion to be, that Goodman acted upon misrepresentations of the debt, and of the value of the property, made to him on behalf of the appellants, and that the release ought to be treated as without consideration, and made in mistake. It is, therefore, necessary first to consider what the alleged representations were, and what evidence there is that they were not true in fact.

It was not, and it is not, alleged, that any other representations were made than those which are contained in a letter from Messrs. Nutt and Murphy (the appellants' solicitors) to Goodman, dated the 26th of May, 1870, in the following words:—

"The Melbourne Banking Corporation, Limited, are mortgagees from John Brougham of his Alma and Hartwood stations, and sheep thereon, now numbering about £20,000.

"The debt now due to the bank under the mortgage is about £18,900, and the bank values its security at £15,000.

"We are instructed to ask you, as assignee of the estate, if you are prepared to take over the security at that value; or whether you will release the equity of redemption in the property mort-

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gaged to the bank; and what evidence you would require of the amount of debt and value of the security.

"Requesting your early reply,

"We are &c.,

NUTT & MURPHY."

To this letter Goodman replied on the same day in the following words:—

"I will convey the equity of redemption of this insolvent's estate to the bank at a valuation of £15,000. If the bank requires to prove for the deficiency, this proceeding will have to be done at a meeting."

The appellants did not require to prove for the deficiency; and the deed itself, which bears date four days afterwards (the 30th of May, 1870), is sufficient primâ facie evidence that they agreed, as is stated in their pleading, and also by their chairman, Sir Charles MacMahon, in his evidence, to waive all right of proof in consideration of the release of the equity of redemption. It proceeds upon the following recitals:—

"And whereas there is now due and owing to the said corporation the sum of £18,900 or thereabouts, on the security of the within-written indenture; and whereas the whole of the sheep runs or stations chattels and premises which are comprised and described in or are now subject to the within-written indenture are valued by the said corporation at the sum of £15,000 or thereabout; and whereas the said John Goodman, being satisfied that the aforesaid sum of £18,900 or thereabout, is so due and owing to the said corporation as aforesaid, and that the present value of the property described and comprised in or now subject to the within-written indenture does not exceed the said sum of £15,000, has elected and agreed to execute the assignment to the said corporation which is hereinafter contained;"

and it purports to be executed in pursuance of that agreement, and in consideration of the sum of £18,900 or thereabouts, so due and owing to the appellants.

Their Lordships are of opinion that if the recitals in this deed were not true it was for the respondent, who is primâ facie bound

by the admissions under seal of Goodman, from whom his title is derived, to prove their falsehood, and not for the appellants to establish their truth by affirmative evidence. The learned Judge in the Court below seems to have taken a different view, and to have held that it was the duty of the appellants to prove in detail by proper vouchers the correctness of the account, making out the debt of £18,900 or thereabouts mentioned in the deed; and it appears to their Lordships that, so far at all events as the question of debt is concerned, this inversion of the onus probandi was the foundation of the decree. It does not clearly appear whether this opinion of the learned Judge was based upon any general assumption as to the burden of proof in all cases of this kind, or upon the special circumstances of this particular case. If he intended to affirm the general proposition that whenever a release by a mortgagor to a mortgagee of an equity of redemption in consideration merely of the amount of the debt is impeached, the burden of justifying it rests upon the mortgagee, that doctrine would be opposed to the judgment of Lord Cottenham in *Knight* v. *Marjoribanks* (1). That was a case of a release, for no other consideration than the amount of the mortgage debt, of the equity of redemption of stations and stock in Van Dieman's Land, by one partner to others; and Lord Cottenham held, in conformity with the opinion of Lord St. Leonards in his Treatise on Vendors and Purchasers, that mortgagor and mortgagee were to be regarded, under such circumstances, until the contrary was shewn by the party impeaching the deed, as on the ordinary footing of vendor and purchaser. If, on the other hand, the learned Judge in the present case considered that the burden of proof was changed by the particular circumstances appearing in evidence, their Lordships are unable to agree with him in that opinion.

The suit was instituted seven years after the date of the transaction, and between four and five years after the time when, according to his own admission, it was known to the respondent. Goodman, who knew all the circumstances, was dead; and Johnson, who was then the appellants' manager, died while the evidence was being taken. The property which was the subject

(1) 2 Mac. & G. 10.

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of the release was of a kind as to which Courts of Equity expect reasonable promptitude of action from those who seek to disturb legal titles; and it had passed for more than six years out of the appellants' hands. The appellants in the first schedule to their answer (filed on the 12th of November, 1877), set forth fully the particulars of all costs, charges, expenses, and payments which they claimed a right to charge (if the release should be set aside) under the mortgage; and their chairman, Sir Charles MacMahon, verified (as to his belief) the correctness of that account. No attempt was made by the respondent in any part of the evidence to shew that in the account so stated there was any fraud, overcharge, or error; and there was only one item pointed out by the learned Judge in the Court below, or by the respondent's counsel at their Lordships' Bar, as in appearance suspicious: viz., a sum of £5 5s., charged as paid to "Goodman" on the 28th of May, 1870, two days before the deed of release. It is impossible for their Lordships (even if they ought to presume this to have been a payment to the official assignee) to assume, in the absence of evidence, that it might not have been satisfactorily explained if it had been challenged, which it was not. Besides the account thus set forth (as required by the bill) by way of schedule to the answer, the books of the appellants were produced by their present manager, Mr. Barlow, who was called as a witness by the respondent; and all such extracts from them as were thought material were put in as part of the respondent's evidence. Their Lordships do not say that these extracts ought on that account to be taken as establishing affirmatively the correctness of all entries contained in them; but no evidence whatever was offered to discredit them; and one of them (the exhibit W) shews in what manner the appellants arrived at the amount of their claim, as stated in the deed of release. That exhibit contains, not a personal account as between mortgagor and mortgagee, but an account between the appellants and the station, headed "Alma station (late Tom's Lake);" and it is continued without break down to the time when the appellants ceased to have any interest in the station, by the completion of James's purchase. Mr. Justice Molesworth observed upon that fact; and it was also insisted upon at the Bar, as if some inference adverse to the good

faith of the transaction of May, 1870, ought to be drawn from it. But it appears to their Lordships that in a business like that of the appellants such an impersonal account would naturally and properly be continued as long as they had the station on their hands, whether by a redeemable title or by one which was not redeemable.

In that account (which was made up at varying rates of interest, generally much lower than 15 per cent., the rate secured by the mortgage deed, and with rests) the same items of charge (apart from interest) appear as in the first schedule to the appellants' answer; and the result is, that on the 21st of April, 1870, £18,820 17*s.* 6*d.* is there shewn as due from the mortgaged estate to the appellants, and on the 30th of May, 1870, £19,294 14*s.* 9*d.* The account so made out was more favourable to the respondent's estate than if it had been stated according to the strict terms of the mortgage deed, with 15 per cent. interest throughout; and it is evident to their Lordships that it was from this account that the amount of "£18,900 or thereabouts," stated in the deed of release, was derived. It seems not improbable that this particular figure may have been arrived at some time before, and that it was not thought necessary to make up the account more exactly. If there was any error, it was (according to these books) rather in understating than in overstating the amount actually due.

It appears by the evidence that Goodman was a man very well acquainted with business. He was trustee and inspector for the Australian Trust and Agency Company, the business of which consisted in lending money on station property. He was accustomed, as inspector for that company, to visit country stations, and to report what might be prudently advanced upon them; and he discharged this duty to their satisfaction from 1863 till the time of his death. Sir Charles MacMahon met him shortly before the date of the deed of release (whether before or after the 26th of May, 1870, is not clear) outside the appellants' bank, and was then told by him that he had been "looking through Brougham's accounts, and that the bank stood likely to make a loss"—a statement quite in accordance with the recitals of the deed.

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It was strongly urged by the respondent's counsel at the Bar that Goodman, as a trustee for Brougham and his creditors, did not properly discharge his duty; that he ought to have done something more than look through the accounts in the bank books, and to have taken some steps (which so far as appears) he did not take, to ascertain, by a personal inspection of the station or otherwise, the value of the mortgaged property; and that, from the fact that the release was executed only four days after Messrs. Nutt & Murphy's letter of the 26th of May, and that in his own reply to that letter (on the very day when he received it) he expressed his readiness "to convey the equity of redemption at a valuation of £15,000," the appellants must be deemed to have had notice that he, being a trustee, neglected his duty. Their Lordships think that if the respondent had intended to rely upon a breach of trust by Goodman, with notice of it to the appellants, that case ought to have been made by his bill; which it is not. But, even if such a case were open upon the respondent's pleading, their Lordships find no evidence, either of any breach of trust in fact, or of any notice of it to the appellants. It was certainly not for the appellants to presume that Goodman did or would neglect his duty. What steps he may actually have taken to satisfy himself on the points mentioned in the recitals of the deed, or when exactly he took them, it was impossible, when he was no longer living, to ascertain. It by no means follows, because the letter of Messrs. Nutt & Murphy and his reply were written on the 26th of May, 1870, that he had previously no information on the subject. The contrary is probable, this station being the only large asset mentioned in the respondent's schedule, filed four months before. Goodman had been with the respondent's witness, Patrick William Brougham, at Tom's Lake, adjoining the Alma station, in February, 1869, and he had then "crossed about four miles of Alma station." Mr. Justice Molesworth himself thought that "he might have obtained sufficient information without leaving Melbourne." There is, therefore, in their Lordships' opinion, no reason for drawing any inference unfavourable to Goodman's conduct, either from the terms of the letters, or from the date of the deed; and the result is, that there is, in their judgment, no ground for relieving the respondent from the

burden of proving the misrepresentations alleged in his amended bill, which, so far as relates to the amount of the mortgage debt, he has not even attempted to do.

There remains only the other alleged misrepresentation as to value; and this might be very shortly disposed of by the mere fact that no representation on this subject was ever made by the appellants, except that they themselves "valued their security at £15,000." This is not a representation by which anybody could possibly be misled or deceived; and even if evidence were given tending to shew that £15,000 was less than the true value of the property, mere undervalue would not alone be a sufficient ground (as Lord Cottenham said in *Knight* v. *Marjoribanks* (1)) for impeaching the transaction. Their Lordships, however, are of opinion, not only that the respondent's evidence fails to throw any real doubt upon the good faith of the estimate of value stated in Messrs. Nutt and Murphy's letter, but that, if on that point the burden of proof had rested upon the appellants, they would have satisfied it. Sir Charles MacMahon (whom Mr. Justice Molesworth exonerates from all intentional deceit) swore that he thought £15,000 was a fair value for the station at the time of the dealing with Goodman, and that the appellants would have sold it for that price. The consideration for the release was not £18,000, the amount of that estimate, but was the whole amount of the mortgage debt, then stated at £18,900, and really standing in the books of the bank at more than £19,000. The appellants had offered to sell the property to Goodman for the amount they put upon it, £15,000, which offer he declined; and their Lordships cannot admit the force of the argument that he could not have found the means of paying such a sum, whatever might be the true value of the property. He was a man of business; and if the value to sell had been anything like the amount alleged by the respondent and some of his witnesses, their Lordships see no reason to doubt that an advance of the necessary funds might have been obtained, especially as it is not shewn that the appellants would have refused to allow reasonable time for that purpose. The witness Richardson proves that Johnson, the appellants' manager (at a time not accurately fixed), mentioned the pro-

(1) 2 Mac. & G. 10.

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perty to him as for sale at £15,000, but Richardson was not then disposed to buy. In March, 1871, when the account against the station still stood in the bank books at more than £18,000, the appellants offered it to one Chirnside for that sum; that offer remained for some time open, but it was eventually declined. The sale eventually made to James, on the 28th of May, 1871, was on terms not much (if at all) more favourable, considering the length of credit allowed; and the debt then stood in the bank books at £21,050 18*s.* 9*d.* In the value of a speculative property of this kind, every year may make a very material difference. Against these facts the respondent has offered no evidence except the opinions of certain stock and station managers opposed to other opinions as to value adduced on the appellants' part; all which their Lordships think it their duty to disregard as immaterial to the true issue in the case, which is one of misrepresentation, mistake, or fraud. Great stress was laid in the judgment below, and in the argument for the respondent, upon the evidence of one particular witness, named Atkins, who took delivery of the station for the appellants in April, 1868, and who said that he valued for the bank when he took delivery at £1 per head (which was equal to £20,000), and so informed the manager; and it was urged that the value must have increased, partly by reason of the appellants' improvements, and partly because this station did not suffer, like others near it, from drought between April, 1868, and the 30th of May, 1870. Atkins, however, remained in the appellants' service for little more than one month; and there is no proof, either that his estimate in April, 1868, was really trustworthy and correct, or that the appellants so regarded it. On the contrary, there is the evidence of Mr. Peck, a stock and station agent, who in 1869 offered the Alma station for sale, advertising it on the 27th of August, 1869. It was put up in the usual way, but was not sold, no offer being made for it; and he says that before 1870 station property in the Alma district "was almost unsaleable." A bank like the appellants' not only may, but in the proper course of their business must endeavour to realise property on which they have advanced money, without any burdensome delay; and their Lordships see no sufficient ground for believing that the appel-

lants could have practically realised in May, 1870, more than the amount at which they then estimated the Alma station; still less more than the true amount of their debt then due upon it, which was the actual consideration for the release.

There Lordships will therefore humbly advise her Majesty that the decree of Mr. Justice Molesworth ought to be reversed, and the respondent's bill dismissed with costs; and the respondent must pay the costs of the appeal.

Solicitors for appellants: *Murray, Hutchins, & Stirling.*
Solicitors for respondent: *Keen & Rogers.*

[PRIVY COUNCIL.]

THE MUSSOORIE BANK, LIMITED . . . DEFENDANT;
AND
ALBERT CHARLES RAYNOR . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Will—Construction—Precatory Trusts—Practice—Petition for Special Leave —Misstatement—Costs.

A testator gave to his widow the whole of his real and personal property "feeling confident that she will act justly to our children in dividing the same when no longer required by her:"—

Held, that the widow took an absolute interest, and that the doctrine of precatory trusts did not apply.

The petition of special leave to appeal in this case stated correctly two valid grounds for granting the same; but contained misstatements of fact which affected the third ground relied upon by the petitioner:—

Held, that any such petition is liable at any time to be rescinded with costs if it contains any misstatement or any concealment of facts which ought to be disclosed. It appearing however that there was in this case no intention to mislead, the appeal was heard and allowed, but without costs.

Ram Sabuk Bose v. *Monomohini Dossee* (1) approved.

APPEAL from a decree of the High Court (Aug. 22, 1878) reversing with costs a decree of the Subordinate Judge of Dehra Doon (May 10, 1878).

* *Present:*—SIR BARNES PEACOCK, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Law Rep. 2 Ind. Ap. 81.

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Special leave to appeal had been granted to the appellants by order of Her Majesty in Council dated the 14th of August, 1879.

Besides a question as to the effect of particular words in a will, whether or not they amounted to the creation of a trust, there was a further question raised as to the effect of certain misstatements which had been made in the petition for special leave to appeal.

Two suits had been instituted by the appellant bank against Mrs. Raynor's executors prior to the suit in which this appeal arose. One was numbered 41 of 1876, and in it a money decree was obtained on the 5th of December, 1876, and certain Delhi Bank shares were attached. The other was a mortgage suit numbered 115 of 1876, and in it a money decree for Rs.32,121 was obtained on the 12th of December, 1876, the High Court in appeal, by its decree dated the 2nd of January, 1878, holding that the bank might enforce its mortgage on certain properties to the extent of Mrs. Raynor's interest thereon. The present suit, numbered 24 of 1877, was brought by the respondent on the 16th of March, 1877, to set aside the attachment of the shares so far as it affected him. The suit was valued at Rs.6000, and was dismissed by the Subordinate Judge on the 10th of May, 1878, but decreed in favour of the respondent on the 22nd of August, 1878, after the time for appealing from the decree of January 2, 1878, in the mortgage suit had expired.

The High Court refused to admit an appeal from the decree of the 22nd of August, 1878, to Her Majesty in Council on the ground that the property at stake in this suit was under the appealable amount.

The petition for special leave to appeal contained the following statements. After referring to the institution of the mortgage suit (115 of 1876), but without mentioning the date thereof or of the judgment of the High Court therein it proceeded:—"The High Court of Allahabad, without deciding this question, ordered that the interest of Mrs. Raynor in the properties should be sold in satisfaction of the claim of the bank under the decree in the above suit. The bank attached the shares of the Delhi Bank held by Mrs. Raynor's executor and executrix, and the respondent herein objected to such attachment on the same ground as above

stated, viz., that Mrs. Raynor possessed only a life interest in the said shares; but his objection was dismissed. He thereupon brought the suit which is the subject of the present application. The suit was brought in the Court of Small Causes at Dehra, exercising its extraordinary jurisdiction, against the Mussoorie Bank, Limited, and prayed for possession of twenty-four shares of the Delhi Bank, attached under the above decree in the suit of *Mussoorie Bank* v. *Executors of Mrs. Raynor*, on the ground that under the will of her deceased husband Mrs. Raynor held them only for her own life, and in trust after her death for her children. The suit was valued at Rs.6000, and was numbered 24 of 1877."

And further, the grounds suggested in the praying part of the petition, why special leave should be granted, were the following:—

"Pray that Your Majesty in Council will grant them special leave to appeal against the same on the ground that the decision, though actually only for a sum of Rs.6000, virtually affects the petitioners' right to have a mortgage security for the three promissory notes aforesaid, in respect of which a decree for Rs.32,121. 2*a*. 4*p*. was awarded to the petitioners; also that the point of law decided by the High Court of Allahabad in this suit was one of great and general importance, and will govern other claims arising in reference to the estate of Mrs. Raynor, and that a decision of Your Majesty in Council in this suit will probably prevent any appeal against the decree in the suit brought by the petitioners as aforesaid, or against the proceedings in execution thereof."

Doyne, for the respondent, referred to *Ram Sabuk Bose* v. *Monomohini Dossee* (1), and contended that the order granting special leave to appeal should be rescinded. The suit under appeal was brought to set aside an order made in the suit (41 of 1876), and the statement in the petition as to the relation between suit (115 of 1876) and the decision therein and the present suit is therefore incorrect and misleading. Owing to accident or negligence there was a misrepresentation of fact as to such relation, and a concealment of fact as to the date of the High Court's

(1) Law Rep. 2 Ind. App. 81.

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decree, and it was contended that had the true facts appeared on the petition the order for special leave would not have been granted.

Graham, Q.C., for the appellant, contended that there was ample ground for granting the order for special leave, apart from the misstatements, which were unintentional. Affidavits had been filed to explain the manner in which they arose. They were immaterial in this sense, that if the facts had been accurately stated, it was still on the merits a case in which leave would have been granted. Reference was made to *Mohun Lal Sookul* v. *Beebee Doss and Others* (1).

Doyne replied.

Their Lordships decided to hear the appeal.

Graham, Q.C. (*Woodroffe* with him), for the appellant, contended that Mrs. Raynor took an absolute interest under her husband's will unaffected by any trust whatever in favour of the children. The Chief Justice in the Court below relied upon *Curnick* v. *Tucker* (2), but that case is distinguishable from this, and moreover in later cases a stricter view is taken of what are called precatory trusts: *Parnall* v. *Parnall* (3). Reference was also made to *Lambe* v. *Eames* (4), where the whole subject is reviewed by Vice-Chancellor Malins, and upheld in appeal (5). See also *Sale* v. *Moore* (6); *Stead* v. *Mellor* (7); *In re Hutchinson and Tenant* (8).

Doyne, for the respondent, submitted that at all events the later cases cited did not get rid of the doctrine of precatory trusts, and that the true effect of the clause in dispute in this case was that the testator gave his widow the right of enjoyment for life with a power of appointment afterwards to be exercised in the mode prescribed, that is by fair division amongst the children.

(1) 8 Moore, Ind. App. Ca. 195.
(2) Law Rep. 17 Eq. 320.
(3) 9 Ch. D. 96.
(4) Law Rep. 10 Eq. 267, 270.
(5) Law Rep. 6 Ch. 597.
(6) 1 Sim. 534.
(7) 5 Ch. D. 225.
(8) 8 Ch. D. 540.

He says "all my estate." [SIR BARNES PEACOCK:—She may use it as required, may she not? SIR ARTHUR HOBHOUSE:—If he had given over what was not required, such gift would have been void for uncertainty.] No doubt there must be definiteness in the object and subject, and clearness as to the way in which it is to go. Here the object is "our children"—the way in which it is to go is by the exercise of the wife's power. The subject, moreover, is clearly defined in the clause. In this way *In re Hutchinson and Tenant* (1) is distinguishable. He referred to *Knight* v. *Knight* (2); *Le Marchant* v. *Le Marchant* (3); *Lambe* v. *Eames* referred to in *Curnick* v. *Tucker* (4). There is no ground for saying that this latter case has been overruled.

The appellant was not called on to reply.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

In this case their Lordships have felt almost more difficulty in deciding whether or not to hear the appeal than they have in disposing of it when heard, and in order to shew the nature of that difficulty it is necessary to state the precise course which this litigation has taken.

In the month of December, 1839, Captain William Raynor died, having left a will which he expressed in the following terms:—"I give to my dearly beloved wife, Mary Anne Raynor, the whole of my property, both real and personal, including my Government promissory notes, Delhi Bank shares, my house at Ferozepore, No. 50, together with all my plate and plated ware, and whatever money, furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all moneys due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her." And he appointed his son William Joseph Raynor, and his wife Mary Anne Raynor, to be his executors. Mrs. Raynor alone proved the will.

(1) 8 Ch. D. 540.
(2) 3 Beav. 172; 9 L. J. (N.S.) (Ch.) 355.
(3) Law Rep. 18 Eq. 414.
(4) Law Rep. 17 Eq. 320.

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During her lifetime no question arose as to the true nature of Captain Raynor's will. It appears that she possessed herself of his property, and she assumed to deal with it as though it were her own. On the 5th of September, 1868, Mrs. Raynor made her will by which she gave to her son, Albert Charles Raynor, who is the respondent in this appeal, "24 of my shares in the Delhi and London Bank," and she also gave him a house and some land. Other property, consisting mainly of houses and land and of Government rupee paper, she gave partly to her daughter Adelaide Louisa Swetenham, partly to her son William Joseph Raynor, and partly to her stepdaughter Elizabeth Goolding. To the latter was given the house No. 50 at Ferozepore, which the testatrix describes as "my house and estate." Mrs. Raynor died some time in 1875, and her will was proved, it does not appear by whom.

In the year 1876 the Mussoorie Bank, who are the appellants, instituted two suits against Mrs. Raynor's executors for the purpose of recovering the sum of Rs.25,000 advanced by the bank to Mrs. Raynor upon the security of thirty Delhi Bank shares and of certain houses. One of these suits, No. 41 of 1876, was instituted in the Small Cause Court at Dehra Doon, and on the 5th of December, 1876, the bank obtained a decree under which the thirty shares were attached. The other suit, No. 115 of 1876, instituted before the Subordinate Judge of Dehra Doon, was to enforce the bank's mortgage upon the houses. On the 12th of December, 1876, the bank obtained a money decree for the sum of Rs.32,121. 2*a*. 4*p*., but the Subordinate Judge refused to give them any specific relief on the basis of the mortgage. His principal reason appears to have been that the nature and extent of Mrs. Raynor's interest in the mortgaged properties was uncertain.

Against this decision the bank appealed to the High Court, who gave judgment on the 2nd of January, 1878. They held that Mrs. Raynor certainly had some interest in the properties she mortgaged to the bank; that she might have had an absolute interest in them, especially as she had acquired them after Captain Raynor's death; and that the bank was entitled to enforce its security against whatever interests might ultimately prove to be hers. They varied the decree accordingly. As regards the in-

terest which Mrs. Raynor had in the properties the High Court pronounced no opinion, holding, quite rightly as their Lordships think, that the question did not arise in a suit in which Captain Raynor's estate was properly represented.

While the appeal in the mortgage suit was pending, Albert Raynor brought the present suit for the purpose of setting aside the order of the 5th of December, 1876, so far as regards the twenty-four bank shares bequeathed to him by his mother, and of obtaining possession of those shares. The identity of the shares with the shares bequeathed by Captain Raynor may be assumed for the present purpose; and the case made by the respondent is that Mrs. Raynor took only a life-interest in her husband's property. On the 10th of May, 1878, the Subordinate Judge dismissed the suit, holding that Mrs. Raynor took an absolute interest under her husband's will. Albert Raynor appealed, and on the 22nd of August, 1878, the High Court gave him a decree on the ground that Mrs. Raynor held her husband's estate, not absolutely in her own right, but as trustee for their children, with a power of appointment among them.

The bank then applied to the High Court for leave to appeal against this decree. On the 13th of January, 1879, the High Court refused leave on the ground that the property at stake in this suit was valued at no more than Rs.6000, and that the question of law was so clear that an appeal could only result in the affirmance of the judgment.

The bank then presented a petition to Her Majesty in Council for leave to appeal, on which leave was granted by an Order in Council dated the 14th of August, 1879. And it is the frame of that petition that gives rise to the preliminary question now raised. Waiving all questions as to the honesty of the petitioners, the respondent's counsel insists that in fact their petition is so framed as to mislead this Board, and to bring it to a favourable decision on false grounds.

The petition states the petitioners' mortgage suit, number 115 of 1876, and it states the effect of the decree of the High Court therein; but it does not give the date of that decree. Then it goes on to state that under that decree the bank shares were

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attached; that Albert Raynor objected; that his objection was overruled; and that thereupon he brought the present suit. The proceedings in the present suit are correctly stated; but it is not true that the bank shares were attached under the decree in the mortgage suit, or that Albert Raynor's objection and suit directly struck at any portion of the decree in the mortgage suit. The shares were attached in the suit relating to them alone, which was valued at Rs.6000 only; whereas the mortgage suit was of greater value.

The first question is, whether the preliminary objection is taken too late. The order was made more than two years ago, and the respondents were fully aware of it; yet no objection was made until all the costs of the appeal had been incurred. As a general rule, the proper course, in a case like the present, is for the respondent to move as early as possible to rescind the Order in Council; and their Lordships think it right to call attention to the opinion expressed in the second volume of the Law Reports, Indian Appeals, p. 82. It is there said, "In their Lordships' opinion an objection of this kind ought to be taken by the respondents as early as the matter is brought to their notice, for the plain reason, that if the leave to appeal is on that ground rescinded, no further costs are incurred: and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from India, and when all the costs attending the hearing have been incurred." At the same time their Lordships desire it to be distinctly understood that an Order in Council granting leave to appeal is liable at any time to be rescinded with costs, if it appear that the petition upon which the order was granted contains any misstatement, or any concealment of facts which ought to be disclosed.

In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal. But they do not think there was any intention to mislead. The appellant's solicitor has filed an affidavit shewing how he confused the decree of the 12th of December made in the mortgage suit, with the decree of the 5th of December under which the shares were attached; and it appears that he did not leave the judgment of the

12th of December to be explained solely by the petition, because a copy of it was among the papers put in with the petition. Still if there had been a material misstatement, it is not sufficient to clear the case of bad faith. To use the words of Lord Kingsdown (1), "Where there is an omission of any material facts, whether it arises from improper intention on the part of the petitioner, or whether it arises from accident or negligence, still the effect is just the same if this Court has been induced to make an order which, if the facts were fully before it, it would not, or might not have been induced to make." Their Lordships therefore proceed to ask whether the order in question was one which they might not have been induced to make if the facts had been fully and truly stated.

The grounds which the petitioner relies on as reasons why an appeal shall be allowed, notwithstanding the value of the suit is only Rs.6000, are three in number: first, that the decision virtually affects the right of the bank to have a mortgage security for the whole sum of Rs.32,000 odd; secondly, that the point of law decided by the High Court will cover other claims arising in reference to the estate of Mrs. Raynor; and thirdly, that the decision on appeal in this suit will probably prevent any appeal against the decree in the mortgage suit, or against the proceedings in execution thereof. Their Lordships consider that the first two grounds are solid grounds for granting the leave asked; and they are not at all affected by the error in the petition. It is clear that if Mrs. Raynor took only a life interest in her husband's property, the bank cannot enforce their decree against any portion of the property enjoyed by her in her lifetime, whether comprised in the mortgage or not, unless they successfully contest against the Raynor family, as to each such portion, the question whether or no it belonged to Captain Raynor or was purchased with his assets. The third ground is affected by the misstatements in the petition; first, because the date of the decree in the mortgage suit is not given, and therefore it does not appear on the face of the petition that the time for appealing had, as in fact it had, then expired; secondly, because the decree obtained by Albert Raynor appears to be more directly mixed up with the mortgage suit, when it is

(1) *Mohun Lal Sookul* v. *Beebee Doss and Others*, 8 Moore, Ind. Ap. Ca. 195.

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stated that the shares were attached under that very decree, than when they are shewn to be attached under a decree in a different suit. Still there is a sense in which the third ground may be explained. It is impossible to suppose that, after the decision of the High Court in this suit, any effectual proceeding could be taken by way of simple execution of the decree in the mortgage suit, for all purchasers would be deterred by the knowledge that they were buying a formidable litigation. It certainly would be necessary for the bank to frame a new suit, properly constituted for the purpose of contesting all questions with the Raynor family and seeking execution of their decree against them. In such a suit as that, the construction of the will might, and probably would, be brought by appeal before this Board. And it might possibly, though probably it would not, be found necessary for properly working an appeal in a subsidiary suit of that kind to obtain leave to appeal from the original decree the execution of which was being prosecuted.

Their Lordships are of opinion that the petition is very faulty, and that due care was not shewn in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed. Their Lordships also were, when hearing the preliminary objection, strongly impressed with the circumstance that there was primâ facie strong ground for an appeal upon the merits. For these reasons they have thought it right to hear the appeal.

Passing to the merits of the case, their Lordships are of opinion that the current of decisions now prevalent for many years in the Court of Chancery shews that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice James in the case of *Lambe* v. *Eames* (1), and by Sir George Jessel in the case of *In re Hutchinson and Tenant* (2). They are further of opinion, that if the doctrine of precatory trusts were applied to the present case, it would be extended far beyond the limits to which any previous case has gone. No case has been cited, and probably no case could be cited, in which the doctrine of precatory trusts has been

(1) Law Rep. 17 Eq. 320. (2) 8 Ch. D. 540.

held to prevail when the property said to be given over is only given when no longer required by the first taker.

Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to shew that he could not possibly have intended his words of confidence, hope, or whatever they may be,—his appeal to the conscience of the first taker,—to be imperative words.

In this case nothing is given over to the children of the testator except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of gift over were precatory only, but it would have been void notwithstanding that the most direct and precise words of gift over might be used. Their Lordships think that substantially the words "when no longer required by her" must in this will be taken to have the same meaning as if he had said, "I give to my children so much as is not required by her." Considering the nature of the property, which includes a number of articles as to some of which the use is equivalent to the consumption; to the nature of the first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of

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the wife, their Lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. That is equivalent to an absolute gift to the wife.

They do not think it necessary therefore to enter into a consideration of the various authorities which have been cited as to the application of the doctrine of precatory trusts, or nicely to weigh one authority against another. They consider it sufficient to say that upon this will the wife took an absolute interest, and that to apply the doctrine of precatory trusts to it would be a very large extension of that doctrine.

The result is, that their Lordships will humbly advise her Majesty to reverse the decree of the High Court, and to substitute for it a decree dismissing the appeal to the High Court with costs; but with respect to the costs of the present appeal they think it right to follow the case, from which a citation has already been made, in the second volume of the Law Reports, Indian Appeals, of *Ram Sabuk Bose* v. *Monomohini Dossee;* and having regard to the nature of the petition presented for leave to appeal, and the course pursued by the Appellants, they will give no costs of the appeal. The money which has been deposited will be returned to the Appellants.

Solicitors for Appellants: *W. Carpenter & Sons.*
Solicitors for Respondent: *Watkins & Lattey.*

[HOUSE OF LORDS.]

H. L. (E.)
1882
July 11.

ARTHUR CHARLES BURNAND (ON BEHALF OF HIMSELF AND ALL OTHER THE UNDERWRITERS UPON THE POLICIES OF INSURANCE ON TOBACCO PER "LAMPLIGHTER" EFFECTED BY THE DEFENDANTS) . . . . . } APPELLANT;

AND

RODOCANACHI SONS & CO. . . . . RESPONDENTS.

Marine Insurance—Valued Policy—Loss—Salvage—Indemnity.

The respondents effected with underwriters valued policies of insurance (including war risks) on a cargo, which was afterwards destroyed by the *Alabama*, a Confederate cruiser, and the underwriters paid to the respondents as on an actual total loss the valued amounts, which were less than the real value. The United States, out of a compensation fund created after the loss and distributed under an Act of Congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters. Under the Act of Congress no claim was allowed for any loss for which the party injured should have received compensation from any insurer, but if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference; and no claim was allowed by or on behalf of any insurer either in his own right or in that of the party insured:—

Held, affirming the decision of the Court of Appeal, that the underwriters were not entitled to recover the compensation from the respondents.

APPEAL from a judgment of the Court of Appeal in favour of the respondents (1) reversing a judgment of Lord Coleridge C.J. in favour of the appellant (2).

The facts are fully set out in the report of the case below.

July 10, 11. *Butt* Q.C. and *Cohen* Q.C. (*Hollams* with them for the appellant:—

The appellant having paid the respondents the total loss as agreed between him and them was subrogated to all their rights: *Randal* v. *Cochran* (3); *Blaauwpot* v. *De Costa* (4); *Gracie* v.

(1) 6 Q. B. D. 633.
(2) 5 C. P. D. 424.
(3) 1 Ves. Sen. 98.
(4) 1 Eden, 130.

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New York Insurance Co. (1); *North of England Insurance Association* v. *Armstrong* (2), per Cockburn C.J.; *Darrell* v. *Tibbits* (3). "Where one person has agreed to indemnify another he will on making good the indemnity be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss;" per Lord Cairns in *Simpson* v. *Thomson* (4). "The assured must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it; or rather such property vests in the underwriters;" per Lord Cottenham in *Stewart* v. *Greenock Marine Insurance Co.* (5). Though there was, at the time of insurance loss and payment, no fund out of which the compensation could be paid, there was at least a moral obligation on the United States Government to apply the fund to the benefit of the assured; and it was not a pure act of grace; nor like a bequest by a relative to compensate for a loss inadequately insured. If the cargo itself had come into the hands of the assured the appellant would clearly have been entitled to it; and there can be no difference in principle between the cargo itself and its value. The obligation to repay is as clear and binding as if it had been expressed in the policy, and no Act of Congress could take it away The valuation is conclusive for all purposes between insurer and assured except that of ascertaining whether there has been a constructive total loss.

Sir H. James A.G. and *Hon. A. E. Gathorne Hardy* for the respondents were not heard.

LORD SELBORNE L.C.:—

My Lords, this is a short, but interesting and important question. Your Lordships have heard a very able argument, and have had the benefit of considering the able opinions of the learned judges in both the Courts below, and I believe there is no doubt in the minds of any of your Lordships that the judgment under appeal is right.

(1) 8 John. N. Y. Rep. 237.
(2) Law Rep. 5 Q. B. 244, 248.
(3) 5 Q. B. D. 560.
(4) 3 App. Cas. 284.
(5) 2 H. L. C. 159, 183.

Now, if I may venture to do so, with that sincere respect which I always feel for everything which falls from judges so eminent as Lord Coleridge and Baggallay L.J. I will indicate what I think is the fallacy in the reasoning of those learned judges. It is this; they have taken the valuation of the policy as conclusive and as operating by way of estoppel between these parties for a purpose for which, as it appears to me, it is not conclusive and does not estop them. For the purpose of the contract of insurance and for the purpose of all rights arising from that contract, it may well be that the valuation in a valued policy is conclusive, and the effect of it may be that for those purposes the assured is not entitled to say "My loss has been greater than that which was covered by the policy." He cannot say that, for the purpose of withholding from the insurer any indemnity or right by way of subrogation or substitution to which by the true legal result of the contract the insurer is entitled. Whenever it is sought to set up an estoppel founded upon the valuation for any purpose going beyond that which I have endeavoured to indicate, the law does not justify such a use of it. It is admitted that that is the English law when it is attempted to use the valuation for the purpose of determining what is and what is not a constructive total loss.

Now it appears to me that for every other purpose collateral to the contract, for the purpose of every question as to whether a particular claim to something which has arisen aliunde is or is not within those rights which result in law from the contract, there is no more reason for holding the valuation to be conclusive between the parties or to operate by way of estoppel than there is in the case in which it is admitted that in England it does not so follow. The title to a particular indemnity granted in particular terms out of a particular fund at the disposal of the United States of America by an Act of the supreme legislature of the United States is not a title which I think can possibly result in law from the contract itself. If such a right exists, it must exist by the combined effect of the contract between the assurer and the assured, and the Act of Congress. It cannot follow from the contract of insurance alone without the Act of Congress.

If the Act of Congress is consistent with such a right, having

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regard to the contract of insurance, still more if the Act of Congress fairly and equitably interpreted confers such a right, there is no reason whatever why the right should not receive full effect. But how is it possible that such an effect can be produced as to a right which could have no existence apart from the Act of Congress, if the Act of Congress itself expressly excludes it? I cannot for a moment understand the doctrine of moral right and obligation or implied trusts affecting supreme governments and independent states, as applied to a question of this kind. The rights resulting from the contract must be such as in point of law the contract makes: the rights resulting from the Act of Congress must be such as according to its true construction and legal effect the Act of Congress makes; and the rights resulting from both together must be such as are consistent with and flow from the legitimate operation of the whole. Here it is admitted that there is in the Act of Congress everything said and done which a supreme legislature could possibly say or do for the purpose of excluding the present claim and attributing that fund which has been appropriated in this case to the sufferers by the capture, not to the valued part but to the unvalued part of the loss. That distinction, which in my opinion does exclude for this purpose the part covered by the valuation of the policy of insurance, is made by the Act of Congress. It was a true and bonâ fide valuation but it did not cover the actual loss. The fund awarded by the Act of Congress of the United States is only for that part of the actual loss which the valuation did not cover and which the insurers have not paid.

Whatever views of moral obligation may be entertained with regard to the Act of Congress, I think it is correctly described by Brett L.J. as an act of pure gift from the American Government (1). We cannot go behind it and inquire into the motives for an act of a supreme legislature on a matter within their legislative powers; and that being so, I am entirely unable, for any practical purpose, to distinguish this case—in which the supreme Government of the United States having absolute power of disposition over this fund have by a solemn Act of their Congress declared that it should be given, not in respect of the loss which had been

(1) 6 Q. B. D. 643-5.

indemnified as between the assurers and the assured but in respect of the loss which the assured had suffered beyond that amount—from the case of a voluntary gift by an individual in the same terms. Mr. Butt, in his able argument, which was as candid I think as it was able, admitted that if a member of the family of the shipowner who had suffered the loss, or the owner of the cargo, had, after the insurers had paid the loss, made a will in the precise terms of this Act of the Congress of the United States, and had given a fund, over which he had absolute control, for the purpose of indemnifying his relatives or his friends for that portion of the loss which the insurance had not covered, the insurers could not have claimed the gift. I am unable to see, for any legal purpose, a distinction between such a case and the present.

It is a satisfaction to me to find that in taking that view of the matter I only differ from Baggallay L.J. so far as this: he thought that the cases of *Randal* v. *Cockran* (1) and *Blaauwpot* v. *Da Costa* (2), before Lord Hardwicke and Lord Northington, under the Order in Council of the 18th of June, 1741, were authorities in point and covering the present case. With the greatest respect for that very learned Judge I am unable to agree in that conclusion. I should not have had any difficulty at all in this case in upholding the claim of the appellant if the Act of Congress of the United States had been in terms similar to the terms of that proclamation (3). The difference is that when

(1) 1 Ves. Sen. 98.

(2) 1 Eden. 130.

(3) During the argument Lord Selborne L.C. sent for the *London Gazette* No. 8024 June 16 to June 20 1741 which contained the proclamation dated 18 June 1741. It was headed "By the Lords Justices, a Declaration appointing the distribution of Prizes taken by way of reprisal before His Majesty's declaration of War." It recited (inter alia) that whereas the king having taken into consideration the depredations and unjust seizures by Spanish ships contrary to the law of nations and in violation of the treaties between Great Britain and Spain, whereby the king's "trading subjects had sustained great losses," and having determined to take measures for vindicating the honour of his Crown and "for procuring reparation and satisfaction to his injured subjects," was pleased with the advice of his Privy Council on the 10th of July 1739 to order that general reprisals should be granted against the ships goods and subjects of the king of Spain; and whereas between that date and the king's declaration of war on the 19th of October following the king's ships had taken several ships vessels and goods belonging to the king

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the King of Great Britain came to distribute the fund which arose from the seizures of goods which had been taken, by way of reprisal, from Spain, the Crown directed it to be divided into moieties: one moiety was to go to the officers and sailors of the ships that had made the captures, but the other moiety was to be paid to and amongst such of His Majesty's subjects as had suffered by the unjust seizures and depredations of the Spaniards. There was no such exclusion of insurers as there is in the present case; in point of law and equity too, the true result of the contract of insurance was that the insurers had taken the loss upon themselves and were entitled to all indemnities received in respect of the loss; they were sufferers in equity at all events if not in the strictest legal sense from those depredations; they were to take the place of the original sufferers, and to have all their rights, and therefore, according to the true effect of that proclamation, it was a grant by the Crown in their favour. If anything of the same sort had been done by the Act of Congress in the present case, it would be very probable that your Lordships would come to the same conclusion. I see that Brett L.J. expresses some hesitation upon that subject. It is not necessary for me to say more about it, excepting that I do not myself share that hesitation. I put the matter entirely upon the ground that the terms of the grant in the cases which have been referred to not only impliedly but actually, according to their fair and legitimate construction in law and equity, operated in favour of the insurers, who having paid the loss were entitled to be recouped.

Those cases, then, appear to me to be clearly and broadly dis-

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of Spain or his subjects or inhabitants, the property whereof became vested in the king; the Lords Justices having taken the same into consideration "together with the great losses the king's subjects had sustained by the repeated depredations by the Spaniards for many years past for which they had received no reparation;" declared that the net produce arising from the sale or disposal of all the ships vessels and goods which had been so seized and taken and which had been or should be condemned, should be divided into two moieties, one "to be paid to and amongst such of the king's subjects as had suffered by the unjust seizures and depredations of the Spaniards, and to be distributed in such manner and proportions and under such regulations as the king should thereafter be pleased to appoint;" the other moiety to be paid to and amongst the officers and sailors of the king's ships who were concerned in the captures, to be divided in the manner provided.

tinguishable from the present case. I think that the view taken by the majority of the Court of Appeal is correct, and therefore I move your Lordships to dismiss this appeal with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. The point, when one comes at it (and I should say, in justice to Mr. Butt, that he has avoided making any false points, and has brought it to us very clearly) is a very short one, and one upon which I have no doubt at all.

The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.

The first question is this. There had been a policy of insurance and a total loss by capture and destruction of the property insured and a payment of the full value insured—a payment of the total loss under that policy. Subsequently to that payment there came the Treaty of Washington; and afterwards, in consequence of an Act of Congress, a sum of money was paid to the persons who had received payment under the policy; and the question, I apprehend, comes to be, Was that sum or was it not paid so as to be a reduction or diminution of their loss?

The cases which have been cited, *Randal* v. *Cockran* (1) and *Blaauwpot* v. *Da Costa* (2), bear this resemblance to the present case, that after the loss had occurred there was a sum of money coming into the hands of the English Government; and the King was pleased (for I think it is clear that he was not bound) to say that half of that money should be applied to those who had suffered from the captures. It was, certainly, I think, a voluntary gift on the part of the Crown, and was for the benefit of the

(1) 1 Ves. Sen. 98. (2) 1 Eden. 130.

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sufferers. But then I think that that gift being made, as it was made, for the benefit of those who had suffered from the captures, and the money being paid for that purpose, it did diminish the loss; and consequently the benefit of it enured to the persons who were bound to indemnify; and it was so decided in those two cases. It was not because the King was bound to pay the money —he was not: it was not because there was a moral obligation to pay it—as if it had been said that our Government would have been shabby if they had not done it: it was because de facto there was a payment which prevented, or diminished pro tanto, the loss against which the insurers were bound to indemnify the assured.

There was a subsequent case, which has not been cited, which proceeded upon an error and has been since reversed (I mean the case of *Godsall* v. *Boldero* (1)) where a person had insured the life of Mr. Pitt, having no other interest in his life than as a creditor of Mr. Pitt, which gave him an interest, and the House of Commons voted out of pure grace and favour a large sum of money to pay Mr. Pitt's debts, and the executors paid this debt. The insurance company set up the defence that this was a contract of indemnity and that Mr. Pitt's debt having been paid there could not be a right to recover against them. Lord Ellenborough falling into a blunder which has been since corrected thought that the contract of life assurance was a contract of indemnity, and accordingly held that that was a good defence on the part of the insurance company. I have been told by people connected with insurance companies and other people with whom I have been brought into contact in the course of my professional experience, that no sooner had that been done than there was such an outcry that every one said he would never insure with a company which was capable of doing such a shabby thing. Consequently the insurance company instantly paid the whole loss and the whole of the costs, and published everywhere that they had done so. Nevertheless Lord Ellenborough's decision stood until it was decided in the Exchequer Chamber (2) that that case went altogether upon a

(1) 9 East, 72; 2 Sm. L. C. 271, 8th ed.

(2) *Dalby* v. *India and London Life Insurance Co.*, 15 C. B. 365; 24 L. J. (C.P.) 2; 2 Sm. L. C. 282, 8th ed.

mistaken idea that a contract of life insurance was a contract of indemnity, whereas it was nothing of the sort. But if it had been a contract of indemnity the grant of Parliament to pay Mr. Pitt's debts would have prevented the man's sustaining any loss by the death of Mr. Pitt, and consequently the decision would have been right. I mention this merely to shew that the question is not whether the money was voluntarily paid or not voluntarily paid, but whether de facto the money which was paid did reduce the loss.

In the present case the Government of the United States did not pay it with the intention of reducing the loss. Lord Coleridge says in his judgment, and says very truly, that the Government of the United States cannot by any action of theirs deprive a man suing in this country of any right which he has. I quite agree in that; but I think that Lord Coleridge, if he had taken the same view as I do of the matter, would have seen that an Act of Congress of the United States might effectually prevent any such right arising. If once the right had vested to recover any such sum, of course an Act of Congress could not take it away; but when Congress in express terms say, "We do not pay the money for the purpose of repaying or reducing the loss against which the insurance company have indemnified, but for another and a different purpose," it effectually prevents the right arising. Bramwell L.J. in his judgment has used the phrase, "It was not given as salvage" (1). I should myself prefer to use my own phrase expressing the same idea and to say that it was not paid in such a manner as to reduce the loss against which the plaintiffs had to indemnify the defendants; it is the same thing but rather differently expressed.

That, I think, would dispose of the case if it were not for a point which Mr. Butt has urged, or rather submitted (for I do not think he argued very strongly in favour of it) namely, that because this was a valued policy of insurance, the value being put at £15,000, the defendants could never under any circumstances, as against the plaintiffs, set up the fact, which is a fact, that the value of the property exceeded £15,000. Upon the statement of that point it looks so artificial when applied to these facts that

(1) 6 Q. B. D. 640.

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one might almost rest there and say, "It cannot be." I think it is plain that the reasons for which the value has been held to be conclusive extend no further than this, that for the purposes of the contract between the parties the policy may be valued at so much. Whether the principle was rightly applied in the case of the *North of England Insurance Association* v. *Armstrong* (1) it is not necessary now to say. I own that if I had a similar case to decide sitting in the Court of Error, I should pause before I said that it was rightly decided, but whether that decision was right or wrong it is not at all necessary to consider here. It is plain to to my mind that the valuation being only for the purpose of the policy of insurance and for the purpose of binding the defendants to admit it in favour of the plaintiffs, this sum was not paid in such a way as to reduce the loss against which the plaintiffs had contracted to indemnify them. The circumstance that by agreement between the parties the amount they had contracted to pay was not to exceed £15,000 appears to me quite immaterial.

For these reasons I agree that the judgment as it stands is right and ought to be affirmed.

LORD WATSON:—

My Lords, I have come to the same opinion as your Lordships upon this point, which is one of novelty but not of great difficulty, and which arises, I think, entirely upon the terms of the Act of Congress. If compensation has, under that statute, been awarded by the American Congress to the respondents in respect of their losses, then I take it that the same rule would be followed as was adopted by the Courts in the two cases which have been referred to of *Randal* v. *Cockran* (2) and *Blaauwpot* v. *Da Costa* (3). In that case the money voted would have been received by the respondents towards indemnification for the loss against which they were insured; and upon the principle that one who has been already indemnified against that loss must impart to those who have indemnified him any benefits which he subsequently obtains of that description the appellant would have been entitled to judgment. But in this case the Act of Congress declares in very express terms, when you take the whole of sect. 12 together, in

(1) Law Rep. 5 Q. B. 244. (2) 1 Ves. Sen. 98. (3) 1 Eden. 130.

the first place that no compensation is to be given by the commissioners on account of loss which has been insured against or covered by insurance, and secondly that underwriters are not to receive any benefit from the funds distributed under the Act, and that the compensation given to any claimant must be given to compensate him for any loss either from want of insurance or from being under-insured. In the present case it is perfectly obvious from the statements made by the parties, upon which they agreed, that compensation was awarded to the respondents upon the second of these grounds, namely, in respect that the insurance which they effected fell short of protection against the whole loss which they sustained.

It is conceded that compensation might be given to the respondents in these very terms and upon this footing by any benevolent individual, who being under no obligation to give it, chose to indemnify the respondents; and it is conceded that in the event of his doing so no claim would lie to that money at the instance of the underwriters. Why the American Congress were not in a position to do the same as any third party might have done, not being under any obligation to do so, I have not been able to understand in the course of this argument; and I do not think that any cause whatever has been shewn why they should not do so. Legal obligation is out of the question; but we have heard something about moral obligation. I do not at all understand what that means. I think that this fund was entirely at the disposal of the legislature of the United States, that it was an act of grace on their part to assign it, and give it either to one or to the other of the losers by the acts of the *Alabama*, and that in giving it as they have done, they were attaching a condition to the gift, which condition was not only entirely within their power but which they might attach without violating any legal responsibility or moral obligation.

Those being my views, I entirely concur in the disposal of this case in the manner which your Lordships suggest.

LORD FITZGERALD :—

My Lords, I concur in the judgment pronounced by the noble and learned Lord on the woolsack, and in the reasons he has

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pressed for that judgment. I adopt also his criticisms on the authorities cited and his limitation to the rule which was contended for by the appellant as the result of some of those authorities, viz. that on a valued policy the value agreed on was as between the parties conclusive under all circumstances and for all purposes, whether incidental to the contract or collateral and subsequent. I hope that I am not exceeding my province in saying that I should have thought this a very plain case if it had not been that I was induced to hesitate on reading the judgments of Lord Coleridge and Baggallay L.J., whose opinions are of such weight and justly entitled to so much respect.

The case presented itself to my mind thus—this is really the old action for money had and received. The parties have expanded by their pleadings the facts on which they respectively rest. The plaintiff alleges that the defendant has received a sum of money which in equity and good conscience he ought not to retain, but should pay over to the plaintiff. The defendant admits he received the sum in controversy through the judgment of the American tribunal, but denies the plaintiff's equity.

I have been wholly unable to discover on what the plaintiff's supposed equity rests. I agree with Brett L.J. that the United States Government might have done as it pleased with the whole £3,100,000, and that when it was devoted to the purposes specified in the Act of Congress it may be regarded as a free gift for those purposes.

The 12th section prohibits its application to such a claim as the plaintiffs'. The whole matter is well expressed by Bramwell L.J. when he says in effect that the defendant received the money under the Act of Congress and judgment of the American Court to keep for himself, and not to pay it over to the plaintiff.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 11th July 1882.

Solicitors for appellant: *Waltons Bubb & Walton.*
Solicitors for respondents: *Markby Stewart & Co.*

[HOUSE OF LORDS.]

BENJAMIN SCARF . . . . . APPELLANT;

AND

ALFRED GEORGE JARDINE . . . . . RESPONDENT.

H. L. (E.)
1882
June 13.

Partnership—Dissolution—Liability of retiring Partner—Election to charge old or new Firm.

A firm of two partners dissolved; one retired and the other carried on the business with a new partner under the same style. A customer of the old firm sold and delivered goods to the new firm after the change but without notice of it. After receiving notice he sued the new firm for the price of the goods, and upon their bankruptcy proved against their estate; and afterwards brought an action for the price against the late partner:—

Held, reversing the decision of the Court of Appeal, that the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might at his option have sued the late partner or the members of the new firm but could not sue all three together; and that having elected to sue the new firm he could not afterwards sue the late partner.

APPEAL from a judgment of the Court of Appeal.

The action was brought by the respondent against the appellant for the price of goods sold in January and delivered in February 1878 to a firm trading under the name of W. H. Rogers & Co., of which firm the appellant was a member until July 1877. On the trial before Denman J. at Guildhall on the 30th of May 1879 the facts were proved which are stated in the judgment of the Lord Chancellor, and it was agreed that the only question to be submitted to the jury should be the date on which the respondent first received notice of the appellant's retirement from the firm, and that all the other questions arising in the action should be tried by Denman J. without a jury. The jury found that the respondent first received notice on the 25th of February 1878, after the goods had been delivered. Denman J. gave judgment for the appellant with costs. The Court of Appeal [Lord Coleridge C.J. and Brett L.J. Baggallay L.J. doubting] reversed this and gave judgment for the respondent for £45 2*s.* 3*d.* with costs.

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June 9, 12. *Forbes* Q.C. and *G. E. S. Fryer* for the appellant:—

The case is either one of novation or of election. If of novation very slight circumstances are sufficient to make the new firm liable: *Ex parte Rivolta, In re Conner* (1); *Rolfe* v. *Flower* (2). If not a case of novation the respondent was put to his election and elected. He could not sue Scarf, Rogers, and Beech together, as they were not jointly liable, but must elect whether to sue Scarf as liable by estoppel, or Rogers and Beech (the new firm) as really liable. No authority on the point can be found. The nearest analogy is that of undisclosed principal and agent; if the creditor with knowledge of the facts chooses to sue the one he discharges the other and cannot afterwards sue him. If the respondent had got judgment against the new firm he could not have afterwards sued Scarf: *Kendall* v. *Hamilton* (3); *Priestly* v. *Fernie* (4). Proof in bankruptcy is equivalent to judgment: Bankruptcy Act 1869 s. 54. The respondent's affidavit in bankruptcy is conclusive evidence against him: *In re Smith Knight & Co., Ex parte Gibson* (5); *Bilborough* v. *Holmes* (6). The proof against Rogers and Beech would not have been admitted in their bankruptcy unless the respondent had agreed to give up his claim against Scarf: *Ex parte Appleby* (7). If Scarf had been sued alone before the Judicature Act he might have pleaded in abatement the nonjoinder of Rogers. The question whether an election has been made is one of fact not law, and there is ample evidence here: *Calder* v. *Dobell* (8).

Finlay Q.C. and *C. A. Russell* for the respondent:—

The liability of Scarf, Rogers, and Beech was not alternative but joint. The effect of not giving notice on the retirement of a partner is to create a partnership by estoppel between the retiring member and the new firm as regards old customers, because they give credit on the faith of his being a partner. But if the liability is not joint but alternative, there was here no election.

(1) Weekly Notes (1882) p. 76.
(2) Law Rep. 1 P. C. 27.
(3) 4 App. Cas. 504.
(4) 3 H. & C. 977; 34 L. J. (Ex.) 172.
(5) Law Rep. 4 Ch. 662.
(6) 5 Ch. D. 255.
(7) 2 Dea. 482.
(8) Law Rep. 6 C. P. 486.

The notice of dissolution was that the debts would be paid by Rogers alone and the respondent corresponded with Rogers alone. Issuing a writ is not an election: the plaintiff must sue to judgment: *Priestly* v. *Fernie* (1). Filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal after the undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor: *Curtis* v. *Williamson* (2); *Bottomley* v. *Nuttall* (3); *Keay* v. *Fenwick* (4). Proof in bankruptcy is not equivalent to judgment except for the specific purpose and in the case mentioned by the Bankruptcy Act 1869 s. 54. The effect of filing an affidavit in bankruptcy appears from the General Rules 1870 rr. 67–73. The respondent never thought of electing, he was only pursuing the ordinary course of business.

[They also referred to the Digest lib. 14 tit. 1 § 17.]

Forbes Q.C. replied.

June 13. LORD SELBORNE L.C.:—

My Lords, the facts in this case are few and simple, but they raise a question which may be of some general importance, and which seems, from what has been stated at the Bar, to be as yet undetermined by authority.

There was a firm carrying on business, under the name of W. H. Rogers & Co., in Manchester, with which the plaintiff, Mr. Jardine, had dealings. It consisted at first of two partners, the defendant, Mr. Scarf, and Mr. W. H. Rogers. On the 27th of July 1877 those two persons dissolved the partnership between them, and another person, named Beech, joined Mr. Rogers, and they carried on the same business, under the same name and at the same place, from that time forward. Of this the Plaintiff, Mr. Jardine, knew nothing until the 25th of February 1878. In the meantime, in January 1878, goods were ordered from him on behalf of the firm carrying on business under the name of W. H. Rogers & Co., according to the ordinary course of business—which

(1) 3 H. & C. 977; 34 L. J. (Ex.) 172.
(2) Law Rep. 10 Q. B. 57.
(3) 5 C. B. (N.S.) 122; 28 L. J. (C.P.) 110.
(4) 1 C. P. D. 745.

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I presume was the same as had prevailed before the dissolution of partnership in the previous month of July—goods were ordered of the plaintiff, and were delivered by him in February 1878 at the place of business of the firm. At the time when they were ordered, and at the time when they were delivered, he was ignorant of the dissolution of partnership which had in fact taken place, and of the fact that the business was then being carried on not by Mr. Scarf and Mr. Rogers but by Mr. Rogers and Mr. Beech. He became aware of those facts upon the 25th of February 1878 on receiving a circular dated on the 21st of the same month of February, by which notice was given to him, and by which the date of the dissolution of partnership was mentioned as having taken place on the 27th of July 1877; and it was at the same time stated that all debts owing to or by the old firm would be received and paid by Mr. Rogers alone, who would continue to carry on the business as theretofore, in partnership with Mr. Beech, under the same style and firm.

The plaintiff afterwards supplied other goods to the new firm. He made no break in the accounts in his books. He rendered an account consisting of the old and the new debts—by "the old" I mean the debt which had been incurred before he became aware of the dissolution of partnership: by "the new" I mean that which had been incurred afterwards—he rendered that account to the new firm. He had some correspondence with them, looking to them as the persons from whom he might expect payment of the whole of that demand; and they on the other hand replied in the correspondence as being prepared to liquidate the debt; they made some payment on account, and they gave a cheque for the balance on the 22nd of July 1878, which was post-dated a week. That cheque when presented was dishonoured; and on the 7th of August 1878 the plaintiff commenced an action against Rogers and Beech for the balance, which included the present demand, that is to say included the demand for the goods which had been ordered in January and supplied in February before notice of the dissolution of partnership. That action was stopped, not by any discontinuance on the plaintiff's part, but by the failure of the new firm, which went into liquidation on the 16th of August 1878. Under this liquidation the plaintiff proved as a

creditor of the new firm, by an affidavit in which he swore that Rogers and Beech were justly and truly indebted to him in the sum of £125 19*s.* 1*d.* for goods sold and delivered by him to Rogers and Beech, that sum including the goods in question.

Your Lordships, I think, must take it upon the facts as they appear that no objection was made to that proof; that it was never retracted; that it was admitted; and although it does not appear upon the proceedings that a dividend has been paid under it, yet at all events, for anything that your Lordships know to the contrary, that may be the case, or may be the case hereafter.

Now after the liquidation and after the proof the present action was brought by the plaintiff against Mr. Scarf, who in point of fact had ceased to be a partner in July 1877, who in point of fact had given no authority to order the goods in question upon his credit, and who as between himself and the persons who did order the goods was at the time when they were supplied a stranger to the business. On the other hand, the persons who actually ordered those goods and to whom they were supplied were Rogers and Beech. They were the persons alone interested in the business, and they were undoubtedly, upon ordinary principles, liable for what they so ordered. The defendant also might be held liable—about that there can be no doubt; because the principle of law, which is stated in Lindley on Partnership (1) is incontrovertible, namely that "when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred;" and the principle on which they are entitled to assume it is that of the estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has accredited him, by reason of any secret revocation. Of course in partnership there is agency—one partner is agent for another; and in the case of those who under the direction of the partners for the time being carry on the business according to the ordinary course, where a man has established such an agency and has held

(1) Vol. i. p. 429, 3rd Ed.

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it out to others, they have a right to assume that it continues until they have notice to the contrary.

There was therefore in this case undoubtedly a state of circumstances which would have entitled the plaintiff, if he had thought fit, to hold Mr. Scarf liable, the credit being given to him and to Rogers, there being no knowledge on the part of the plaintiff of the dissolution of partnership; no knowledge of any revocation of the agency at the time when these goods were delivered. On the other hand, if you look not to the estoppel but to the fact, the plaintiff was entitled to hold the persons who actually gave the order and received the goods, and were interested in the profit and loss of the firm which ordered them, liable to him; those persons being not Scarf, Rogers, and Beech, or Scarf and Rogers, but Rogers and Beech alone.

Now it appears to me that the real question which your Lordships have to determine is not as it was treated in the Court below—in I think both the Courts below—namely, the question of what is called "novation;" but it is this, whether in that state of circumstances there was a concurrent joint liability of the three persons, Scarf, Rogers, and Beech, upon the principles which I have stated; or whether the plaintiff had a right to make his choice whether he would sue those who were liable by estoppel, or sue those who were liable upon the facts. Put it as I can I am unable to understand how there could have been a joint liability of the three. The two principles are not capable of being brought into play together: you cannot at once rely upon estoppel and set up the facts; and if the estoppel makes A and B liable, and the facts make B and C liable, neither the estoppel nor the facts, nor any combination of the two can possibly make A, B, and C all liable jointly.

Therefore it appears to me that if the plaintiff chose to go upon the facts and to make the persons who actually ordered and got the benefit of the goods his debtors (which he had a plain and certain right to do), he entirely disavowed the estoppel and could no longer set it up. If on the other hand he chose to go upon the estoppel, then Beech being a stranger to the liability upon that footing, he could only sue Scarf and Rogers. One way of testing it would be by inquiring what was the rule under the

old system of pleading. If at that time Scarf and Rogers had been sued, could they have pleaded in abatement that Beech ought also to be joined as being also liable? I think most clearly they could not. And upon the other hand if Rogers and Beech had been sued, still more impossible would it have been for them to plead in abatement that Scarf ought also to be joined, for he was neither a partner when the goods were ordered, nor as between him and themselves could any liability possibly have attached to him.

It seems to me therefore that the plaintiff was necessarily put to his election. He might hold either Rogers and Scarf, or Rogers and Beech, liable: he could not hold Rogers, Scarf, and Beech all liable together. That makes it unnecessary for me to say much upon the question of novation, except that if your Lordships should differ from the Court of Appeal in this case you will have the satisfaction of feeling that you do so on grounds which do not seem to have been clearly or fully presented, if they were presented at all, to the Court of Appeal. In the Court of first instance the case was treated really as one of what is called "novation," which as I understand it means this—the term being derived from the Civil Law—that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if in that case they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm, to the effect that he will accept their liability instead of the old liability, and on the other hand that they promise to pay him for that consideration.

Now if this case had rested upon that ground (on which it appears to have been put in the Court of first instance), I could not myself have agreed in the decision at which the Court of first

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instance arrived; because there is really only one act done upon which a serious argument, as it seems to me, could be founded in favour of novation, if the circumstances had required that the case should be put upon that ground. I mean the giving of the cheque which I have already mentioned, on the 22nd of July 1878 by the new firm. Down to that time it was, as it seems to me, merely in the natural and ordinary course of things that when the notice of dissolution referred to Mr. Rogers (who was continuing to carry on the business of that firm with Beech), as the person who would receive and pay all debts owing to or by the old firm, either Mr. Rogers or his firm should act in the liquidation of the affairs and debts of the old concern; and the mere corresponding with them, the mere sending in the account to them, would not, as it seems to me, make Beech liable unless he did something to make himself liable beyond carrying on that kind of correspondence. Then, upon the other hand, is there sufficient evidence of the intention which would be necessary on the part of the plaintiff to relinquish these original debtors? The fact of this cheque being given, which as I have said is the only thing which can be relied upon as shewing that Beech was willing to make himself liable, is perfectly consistent with the plaintiff's not relinquishing the original debtors. If it results in payment he is perfectly entitled to take it. If it does not result in payment it will not fulfil its original object. It did not result in payment, and the action followed. The proof in bankruptcy afterwards being in invitos, though it might be some evidence of the intention of the plaintiff to get what he could out of Rogers and Beech, yet certainly would be no evidence of any accession on the part of Beech to the liability, which was not upon him at all.

I therefore should not have differed from the opinion of the Court of Appeal if I had thought (as the Court of Appeal seem to have treated it) that the case depended upon what is called the doctrine of novation. I am inclined to say that the facts which have taken place were susceptible of an interpretation consistent with an intention on the part of the plaintiff to retain his original debtors, at all events at the time of action brought, and that on the other hand there was nothing to make Beech a debtor if he had not been so before. But as Beech was really a debtor,

the whole doctrine of novation disappears from the case, and the question is which I originally stated, namely whether it is is possible, after choosing to hold those who actually gave the order and received the goods liable, and proceeding against them as debtors in such a way as to amount to a distinct election to take their liability, to retract that and to fall back upon the liability which, on a different principle, might have been asserted against the other two, that is to say against Scarf and Rogers, to the exclusion of Beech. I think that the plaintiff was bound by his election, and that after approbating the liability according to the facts, and taking as his debtors those who had actually given the order, he could not when it suited his convenience retract it, reprobate it, and go back upon the liability, by estoppel, of the man who never gave the order at all.

Then did the plaintiff do that which was, and ought to be held as, an election of liability? I think that he did, with full knowledge of all the facts from the 25th of February. He not only carried on the correspondence to which I have referred—which might have been entirely consistent with his reserving his right to elect; he not only received the cheque—upon which I am disposed to make the observation that taking it would not have been a conclusive election—but he brought his action against Rogers and Beech; and not only did he bring his action, but when the action was stopped by the liquidation he carried in his proof, swearing that they were justly and truly indebted to him for the goods as sold and delivered by him to them. Rogers and Beech were in point of fact the debtors, and he had the benefit of that which really (without going into any technical distinctions) for this purpose appears to me to be a sufficient ground of judgment.

I do not think it necessary to go into any of the cases which have been mentioned, because I think that the principle is perfectly distinct. The case, which was relied upon by the respondent, of *Curtis* v. *Williamson* (1) simply held that the mere act of making and filing in bankruptcy an affidavit of the kind which was made was not one as to which the party would have no locus penitentiæ under any circumstances, where he had been desirous,

(1) Law Rep. 10 Q. B. 57.

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when he had fully considered the matter, of withdrawing it before it was put upon the file; and nothing was done, so far as appears, after it was put upon the file. There was nothing to bind him to his election except that inadvertent and (at the time when it was done) unintentional act of his agent; and the Court were quite right in holding that that ought not to be regarded as an election by him.

I need not refer particularly to the facts of *Bilborough* v. *Holmes* (1), but a proof, under circumstances similar to the present, was held, upon the principle of election, to bind the party who made it. In *Bottomley* v. *Nuttall* (2) an acceptance had been given, which was evidence of a successive obligation, and proof of it would by no means extinguish or destroy any right which the party might have upon the original debt and the original consideration.

There is, therefore, as was frankly admitted at the Bar, no direct authority upon this point. Your Lordships are obliged to determine it upon principle; and on principle I think your Lordships ought to hold that the Plaintiff was put to his election, that he made it when he brought the action and proved in the liquidation, and that he cannot now, consistently with the election which he has made, hold Mr. Scarf liable.

I therefore move your Lordships, that the order under appeal be reversed; which will have the effect of restoring the judgment of the Court of first instance; and that the defendant (the appellant here) have his costs in the Court of Appeal and in this House.

LORD BLACKBURN:—

My Lords, I am of the same opinion. This was an action against Scarf to recover the price of goods sold and delivered. It is admitted that on the 30th of January 1878 the goods were ordered from the plaintiff Jardine by Rogers, he sending the order in the name of the firm of W. H. Rogers & Co., which was the name under which he and Scarf had traded, and under which name they had dealt with the plaintiff; that the plaintiff well knew that he and Scarf had been the persons so trading;

(1) 5 Ch. D. 255. (2) 5 C. B. (N. S.) 122; 28 L. J. (C.P.) 110.

that those goods thus ordered upon the 30th of January were afterwards supplied, part upon the 1st of February, part upon the 16th and part upon the 20th. One question of fact was, when had the plaintiff, Jardine, notice of what was the fact, namely that Scarf had ceased to be a partner, and that at the time when the goods were ordered and at the time when the goods were supplied, the firm of Rogers & Co. consisted not of Rogers and Scarf but of Rogers and Beech, who had not been formerly a partner but had come into partnership with Rogers afterwards and not till Scarf had retired? Now on that, I understand, the question went to the jury.

The fact was plain that on the 5th of February 1878 this notice was printed in the *Gazette*: "Notice is hereby given that the partnership heretofore subsisting between us, the undersigned Benjamin Scarf and William Henry Rogers, carrying on business as merchants at 32 Church Street, Manchester, under the firm of W. H. Rogers & Co., was dissolved by mutual consent on the 27th day of July last. All debts owing to or by the said firm will be received and paid by the said W. H. Rogers alone, who will continue to carry on the business as heretofore, in partnership with the undersigned James Beech, under the firm of W. H. Rogers & Co." If Mr. Jardine, the plaintiff, had not been a person who had dealt with the former firm, the notice in the *Gazette* would have given him notice as from that 5th of February which was after the order had been given upon the 30th of January. The goods were delivered at different times, as I have stated, substantially after the 5th of February; and it was material to ascertain when it was that Mr. Jardine got actual notice. As soon as he was aware of this notice being published in the *Gazette* it is quite plain that he would know that the authority which had originally belonged to Rogers to bind himself and Scarf had been revoked. But he was not bound to read the *Gazette*; and in point of fact it appears, according to the finding of the jury, that he did not read it; and it was not until the 25th of February that he received a circular, at the bottom of which was appended the *Gazette* notice, and which circular was in these terms: "Sir, I beg to call your attention to the annexed notice of dissolution of partnership lately existing between Mr. Benjamin Scarf and myself, and I

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have the pleasure to inform you that Mr. James Beech has joined me in the business, and will take an active part. The style of the firm will not be altered. Undernoted are the signatures of each partner. Yours truly, W. H. Rogers;" then the signatures were given, and below that was a copy of the notice which had been previously published in the *Gazette*. The finding of the jury was that this notice came to Mr. Jardine on the 25th of February, and not sooner.

Now that being the case, the question then arose, what defence, if any, was proved. It was agreed that this should be determined by the Court without asking any further question of the jury, but taking the evidence and drawing the inferences of fact, whether there was a defence or not. On that Denman J. who tried the case thought (it was apparently put to him in that way) that the question was whether or not there was novation; which the Lord Chancellor has just said (and I quite agree with him) is another word for accord and satisfaction by giving in substitution the liability of another person upon another contract in lieu of the contract for which the former partners were liable; and Denman J. thought that there had been a novation proved.

When the case came before the Court of Appeal the majority of the Court of Appeal (Baggallay L.J. seems to have doubted about it) thought that the novation in that sense was not proved. I do not feel quite certain whether if I knew all the evidence (for it has not been brought fully before us)—if I thought the question was whether there was novation or not—I should have agreed with them that on the evidence brought before us it was not in this case proved. I need not, however, enter into the question how that was; because my opinion, which leads me to concur in the judgment which has just been moved, is that that was not the real question—that there was a mistake and a misapprehension on the part not only of the counsel who argued it, but of the Judges who heard the case, when they thought that the question was that of novation, the defence really depending upon a prior question.

Though the amount now in dispute is very small, the question is an important one. I do not think there can be any doubt (it is very old law indeed) that where a person has given authority to another (it is not peculiar to partnership) the authority being

such as would apparently continue, he is bound to those who act upon the faith of that authority, though he has revoked it, unless he has given the proper notice of the revocation. In this case I think there can be no doubt that Rogers having been partner with Scarf had authority, and apparently continuing authority, to bind Scarf as to all matters concerning the partnership, and that Mr. Jardine being an old customer had a right to believe that that authority continued until he was told that it was revoked. But then I do not think that the liability is upon the ground that the authority actually continues. I think it is upon the ground, as has been very well put and explained in *Freeman* v. *Cooke* (1) that there is a duty upon the person who has given that authority if he revoke it, to take care that notice of that revocation is given to those who might otherwise act on the supposition that it continued; and the failure to give that notice precludes him from denying that he gave the authority against those who acted upon the faith that that authority continued. I put rather an emphasis upon those last words "against those who acted upon the faith that that authority continued," for I think that no man has a right to say "I know now that the authority was in fact revoked, but I will continue to go on, and will do things subsequently, and act upon the supposition that I hold this person liable, though I am not actually acting upon the faith that he has given authority, but I am acting upon the ground that I find another is really liable, and I will only come on him if that other does not pay." I do not think he can do that. The question therefore is this, was Mr. Jardine acting upon the faith that it was so?

Now Mr. Jardine upon the 30th of January, as far as appears upon the evidence, had never so much as heard of Mr. Beech. Mr. Jardine when he received the order from W. H. Rogers & Co. had every reason to think that he was contracting to supply these goods to Rogers and Scarf, and he did supply the substantial part of the goods on the 1st, 16th, and 20th of February, before he had any notice that he was not supplying them to Rogers and Scarf. Therefore clearly at that time he was in the case of a person who had acted upon the faith that W. H. Rogers's authority when he gave the order still continued when he supplied the goods; and

(1) 2 Ex. 654.

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he therefore certainly had a right to hold Scarf liable on that ground. But it is quite clear from the notice, and the circular which I have already read, that on the 25th of February he became aware that though Rogers had apparent authority, and though he having acted upon that apparent authority had a right, if he pleased, to hold Scarf liable, yet in point of fact Scarf was not really a principal, and had not given real authority; that in point of fact Rogers was not acting by Scarf's authority but by Beech's authority, and that Rogers and Beech were the real persons who had ordered the goods and who had received them, and were the persons who were therefore liable; because in fact Rogers had authority from Beech and had not in fact authority from Scarf.

The first question therefore which arises is, could a person who knew that he held both Beech and Rogers liable, and had very rightly the power to say "I will treat this as being a joint liability of Rogers and Beech" say "I will treat it not only as the joint liability of Rogers and Beech, but as the joint liability of Rogers, Beech, and Scarf," treating them all three as jointly liable? And certainly, though counsel could not produce any precise authority upon the point, I should myself, unless I had seen what the Judges of appeal had here said, never have entertained the slightest doubt that he could not. I should not myself have entertained a doubt that in old times a plea in abatement, in an action against Rogers and Beech for not joining Scarf, would have been bad; nor could I have doubted that in old times if an action had been brought against Rogers, Scarf, and Beech jointly, there would have been a nonsuit entered, upon the ground that there was a variance in the proof—that there was no proof that the three were liable. I say, I should not have doubted that at all if I had not found (unless there has been some misprint, or some inaccuracy in the shorthand note) that that was not the view of the Court of Appeal. Lord Coleridge is reported to have said, "The three partners are all primarily liable clearly." I think that at the moment when he said that he could not have had the facts before him. The three never were partners at all—I cannot see how he could possibly say that that was the case if he remembered the facts. Brett L.J. does not say that in terms,

but he does say what almost involves the same thing. When he treats it as a novation he says "I cannot infer from the fact of his making a claim against people with respect to whom he had a valid claim" (by that he means Rogers and Beech) "that he had given up his claim against another person who was liable to him." Now I do not think that that other person (Scarf) was as I have said before, liable to Jardine. Scarf was precluded or estopped from denying that he had given the authority which would have made him liable, if the fact had been so, but I do not think that it was so; and I agree with what the Lord Chancellor has said, that the difference is an important one.

There seems not only to be no distinct authority upon the subject, but there really seems to have been a doubt in the minds of these able Judges (at least it is quite clear that they do not seem to have perceived the point clearly) whether or no the Plaintiff could consider all three persons jointly liable. I think it important to say distinctly that in my opinion he could not, and to say that the right which the Plaintiff had when he got the notice on the 25th of February was to sue either at his option, but he was not bound to sue Scarf. He might very reasonably and properly say "I think that I have a legal right to hold Mr. Scarf liable because he did not give notice to me in time; but I am not going to do so. I find now that I have a right to hold Rogers and Beech liable and will do so;" and if he had communicated that to the parties, there could be no doubt at all that when he had elected thus to charge Rogers and Beech and Rogers and Beech only, there would have been no question whatever that it was a final and conclusive election and that he could in no way after that charge Scarf. But he had also a right if he pleased to say "I will proceed upon the ground that Scarf has made himself liable to me. I will hold Scarf liable." But in that case I think he could not hold Beech also liable. It seems to me that he had his choice between the two: he had his choice whether he would hold Rogers and Beech liable as in fact they were, or Rogers and Scarf liable as he had supposed they were, though Scarf was not liable in fact; but he could not hold both sets of persons liable. And then comes the question which ought to have been decided, not whether there was a novation (upon

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which probably if I had thought that that was the question I should have agreed with the majority of the Court of Appeal) but whether the Plaintiff had before the 30th of September, the date at which he for the first time made a claim against Scarf, made a final determination of the election by which he had to choose which of the two sets of parties he would hold liable.

Now on that question there are a great many cases; they are collected in the notes to *Dumpor's Case* (1), and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. "Quod semel placuit in electionibus, amplius displicere non potest." That is Coke upon Littleton (2), and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made.

But upon that comes the question which is the one that now arises, whether there was evidence here on which your Lordships should find as a fact that there was an election. In *Clough* v. *London and North Western Railway Co.* (3) the Exchequer Chamber had to consider that question a good deal in a case of some importance in which the judgment was carefully considered. I wrote it myself and I say nothing further about it than this, that it had the full assent of all the other Judges. The result of what is there said is that where there is a right to elect the party is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons, and accordingly in that particular case it was held that he had not lost his right to elect by a reasonable waiting under rather peculiar circumstances; but when he has once fully elected it is final.

I may also refer to the case of *Jones* v. *Carter* (4) as most neatly stating the point. The principle, I take it, running through all the cases as to what is an election is this, that where

(1) 1 Sm. L. C. 8th ed. 47, 54.
(2) 146 a.
(3) Law Rep. 7 Ex. 34.
(4) 15 M. & W. 718.

a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. In *Jones* v. *Carter* (1) (the principle is general though the particular application is peculiar) the question was whether a man who had a right to avoid a lease had avoided it or not. He had at first brought a writ of ejectment for the purpose of avoiding it, by which in modern times you do not actually enter; but it had proceeded so far that the defendant had entered into a consent rule; and the defendant having entered into a consent rule by which he had admitted the entry, the Court held that it must be taken as if the plaintiff had entered, and that inasmuch as the entry to avoid a lease was unequivocal in its nature he could not afterwards say "The lease was not void."

Now that is the question which I think the Court below ought to have decided and which I think your Lordships now, having power to find all the facts, have to decide upon the evidence. Was there, before the 30th of September, which was the date when the plaintiff first came upon Scarf, an unequivocal election to take Beech as his debtor? I do not think that at first there was. I do not think that the mere fact of his having continued to enter in his books these goods along with others which he had undoubtedly contracted to supply after the 25th of February, when he had full notice (entering them in one account), would preclude him; because I think as I said before, that it was merely an expression of his own private intention and opinion, which did not bind the matter until it was communicated to the other side, which it never was. I do not think that his having

(1) 15 M. & W. 718.

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demanded money from Rogers after he knew that Rogers was carrying on the new firm of Rogers & Beech will do, for the reasons given by Brett L.J., that the notice of dissolution distinctly said "Whatever Rogers & Scarf owe, go to Rogers, and Rogers will pay it." But then the evidence goes further. I am not sure that taking a cheque from Rogers & Beech as payment was enough to make an election, because I think that in acting on the authority given by Scarf to Rogers to pay the debts for him and Scarf, Rogers might pay money by the new firm's cheque or otherwise as he pleased. But then the plaintiff goes on and issues a writ against Rogers & Beech—he sues Beech. I am unable to conceive a more unequivocal act; he has thereby adopted Beech as his debtor at that time. I do not think its going to judgment or not going to judgment is material. How he could possibly do a more unequivocal act than issuing a writ against Rogers & Beech I cannot imagine. The result of his issuing the writ was that Rogers & Beech not being able to get time to obtain terms went into liquidation, and then the plaintiff sent in his affidavit claiming to prove against Rogers & Beech for this sum which is now in dispute, and also for the subsequent debts, treating them all as one. I think that also is an unequivocal act. And taking the whole together I can bring myself in no way to doubt, that upon the facts we ought to find that Mr. Jardine having the right of election between holding Beech liable and holding Scarf liable, had, before he ever came upon Scarf, finally determined his election and taken Beech as liable, and that he could not hold both Scarf and Beech liable.

I am consequently of opinion that the judgment should be for the defendant, though not upon the ground on which it was originally put, namely that there was a novation, but upon the ground that Scarf never was liable, for this reason, that before any step was taken to make him liable, a final and conclusive election had been made to hold Beech liable, which involved impliedly that Scarf was not.

LORD WATSON:—

My Lords, this case has been disposed of by the Court of Appeal upon the assumption that the position of the appellant is, in law,

precisely the same as if he had been in fact a partner of the firm by which the debt sued for was contracted. Had the appellant actually been a member of the firm of W. H. Rogers & Co. on the 30th of January 1878 when the goods, the price of which is now in question, were ordered, he would thereby have become the debtor of the respondent, and it would in that case have been necessary for him to satisfy your Lordships that the facts, admitted or proved, are sufficient to sustain the inference that the respondent has agreed to discharge his claim against the appellant, and to accept the new firm of W. H. Rogers & Co. as his debtors. In such circumstances the original debtor must continue to be liable unless there has been payment or novation of the debt.

The appellant had in point of fact, ceased to be a partner of the firm of W. H. Rogers & Co. before the goods were ordered or supplied to the new firm. Notwithstanding that fact he was estopped from asserting as against the respondent, who had been one of his customers, that the contract was not made with the old firm, because notice had not been given to the respondent of its dissolution by his ceasing to be a partner. In other words, although the goods were ordered and received by the new firm, it was the right of the respondent, if he chose to assert it, to insist that the old firm, and not the new, must be held to have contracted with him, and to be liable for the price of goods supplied under the contract before he received the notice of the 21st of February 1878. He had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfilment of the contract; but I know of no authority for the proposition that the respondent could hold his contract to have been made with both firms, or that having chosen to proceed against one of these firms for recovery of his debt he could thereafter treat the other firm as his debtor.

I am accordingly of opinion that the facts of the present case raise no question of novation, and that the only question to be determined is whether the respondent did or did not elect to take the new firm of W. H. Rogers & Co. as his debtors for the price of the goods furnished by him prior to the 25th of February 1878 under the order given by that firm upon the 30th of January.

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In this aspect of the case it becomes unnecessary to dispose of the question discussed and decided in the Courts below, namely whether the transactions of the respondent with the new firm subsequent to the notice of February sufficiently establish the appellant's plea of novatio debiti. I am of opinion, with your Lordships, that the legal proceedings to which the respondent resorted in August and September 1878 fully warrant the inference that he did elect to take the new firm as his debtors, and consequently that he has no right to recover the debt for which he sues from the appellant.

LORD BRAMWELL:—

My Lords, I am entirely of the same opinion. In this case the plaintiff had the right to maintain an action against Rogers and Scarf or against Rogers and Beech; and indeed, subject to what would have been a plea in abatement formerly, and now is the addition of a party by order, he had the right to maintain an action against each one of the three; but he would have been compelled to join one of the two with the other—he would have been compelled to join Rogers with Scarf if he had sued Scarf alone, or Rogers with Beech if he had sued Beech alone, or Beech or Scarf with Rogers if he had sued Rogers alone. For I imagine that under the Judicature Act and the rules he could be compelled to sue the two jointly and not severally; otherwise the effect of the Judicature Act would be to turn every joint contract into a joint and several contract, which I imagine was not intended. It results therefore that the right of the plaintiff was to sue either Rogers and Scarf jointly, or Rogers and Beech jointly. I am very clearly of opinion that he had no right to sue all three jointly. It is impossible to say that there was any joint contract by the three, either in fact or by estoppel.

Now that being the condition of things, when the truth was known to the plaintiff, I do not think that he was bound to elect at any particular time; but I am satisfied that when he did elect he was bound, and that after seeking to enforce his remedy, or indeed enforcing his rights, against one pair, that is to say Rogers and Beech, he had not the right to maintain another action against Scarf separately. He could not maintain a second action against

Scarf unless he joined Rogers with him, and the result would be that there would be two actions against Rogers for the same debt. It seems to me demonstrable, therefore, that if the plaintiff elected to sue any two he could not maintain an action against the third man either separately, or jointly with one of the two whom he had originally sued.

That being so, the plaintiff was not bound to elect, but if he did elect he was concluded by his election; and without occupying your Lordships' time further I have only to add that it is to my mind absolutely plain that in this case his conduct was an election to sue and maintain his action against Rogers and Beech, and consequently that he has lost his right to maintain any action against Scarf.

Order appealed from reversed; judgment of Denman J. for the defendant (the appellant) restored, with costs in the Court of Appeal and in this House; cause remitted to the Queen's Bench Division.

Lords' Journals 13th June 1882.

Solicitors for appellant: *W. & J. Flower & Nussey, for Killick, Hutton, & Vint, Bradford.*

Solicitors for respondent: *Buchanan & Rogers.*

[HOUSE OF LORDS.]

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THE ROYAL BANK OF SCOTLAND . . APPELLANTS;

THE COMMERCIAL BANK OF SCOTLAND AND OTHERS . . . . . } RESPONDENTS.

Practice—Scotch Bankruptcy—Lien—Bills accepted against Goods—Bankruptcy of both Drawer and Acceptor during Currency of Bills—English Rule of Ex parte Waring (19 Ves. 345; 2 Rose, 182) *inconsistent with Scotch Bankruptcy System.*

Rule of the English bankruptcy system fixed by *Ex parte Waring* (19 Ves. 345; 2 Rose, 182), and as extended in subsequent cases, has not been adopted in Scotland and is inconsistent with Scotch bankruptcy law.

In Scotch practice where B. accepts bills drawn by A. against goods left in B.'s hands as security, if both become bankrupt, the bill-holder can rank on the estate of each for the amount of the bills to the effect of recovering full payment, but B.'s estate is entitled to be indemnified for any dividends which his estate may be required to pay in respect of the bills, A.'s estate having a right to the balance of the proceeds of the goods, after such indemnity has been given.

By agreement between A. and B., the latter undertook to employ his works in heckling and spinning yarns at a specific rate. By the 8th article of the agreement it was provided that all material and yarn at B.'s works should continue to be the sole property of A., subject only to the lien of B. for the cost of manufacture and for advances made by him, or other debts due to him by A. By the 9th article B. became bound to give his acceptances for a sum not exceeding three fourths of the value of the raw material and yarn held by him on A.'s account, and should be entitled to "a right of lien or retention of goods to a value sufficient to cover such acceptances."

Both A. and B. became bankrupt. At the date of the bankruptcy B. was liable as acceptor on bills drawn by A. to the amount of £16,000, and he held goods belonging to A. (since sold for £4025 14*s.* 2*d.*), on which he had a right of lien or retention to indemnify him from that liability. The holders of the bills claimed to have the whole proceeds applied, in the first place in payment of the bills, as far as they would extend, so as to reduce their amount of proof against the two estates to about £12,000 instead of £16,000, relying upon the English case of *Ex parte Waring* (19 Ves. 345; 2 Rose, 182).

B.'s trustees maintained that the bill-holders must continue to rank on both bankrupt estates for the full amount of the bills, and claimed that all dividends paid by them to the bill-holders out of B.'s estate should be repaid to them from the fund in medio:—

Held, affirming the decision of the Court below, that in view of the agree-

ment, and in accordance with the principles on which the bankruptcy laws have hitherto been administered by the Courts of Scotland, B.'s trustees were entitled to the fund in medio, in order that they might apply it towards their relief from the payments which they were liable to make in the shape of dividends to the holders of the bills; (2.) That the balance of the fund, if any, was payable to A.'s trustee:—

Held, also, if the security were sufficient to cover the whole amount of the acceptances, the rule of *Ex parte Waring* might be the most convenient practicable way of giving effect to the contract between the drawers and acceptors, but where the securities are insufficient, the rule confers a benefit on the bill-holders to which they are not entitled, at the expense of the acceptors, which was inequitable, nor could it be reconciled with the reasons of Lord Eldon's judgment in *Ex parte Waring*.

Per LORD SELBORNE, L.C.:—Assuming that the positive rule of administration which has been accepted as the law in England since the rule of *Ex parte Waring* was made, must be understood in accordance with the determination in *Powles* v. *Hargreaves* (3 D. M. & G. 453), still so far as it is a positive rule, and not the necessary result of equitable principles, it cannot be held to be of force in Scotland, merely because it is so in England.

And: The reasons assigned by Lord Cranworth in *Powles* v. *Hargreaves* (3 D. M. & G. 453) to justify the extension of *Ex parte Waring* to the case of a deficient security are unsatisfactory if applied to such a contract as this, and appear to overlook the fact that, when the whole benefit of a deficient security is given to the bill-holder, the estate of the bankrupt acceptor may lose some part of the indemnity to which, by the contract, he is entitled.

APPEAL from the First Division of the Court of Session, Scotland. The question raised by this appeal was whether the rule of *Ex parte Waring* (1) was or was not to be applied in Scotland under circumstances in which it would undoubtedly be applied in England.

By agreement, dated the 22nd of April, 1870, between James Ramsay, merchant in Dundee, and David Hogg Saunders, millspinner, in Blairgowrie, the latter undertook for a period of ten years to hackle and spin yarns for the former at certain specified rates. The agreement was to subsist for ten years. By article 8 of the agreement it was provided that—"All material and yarns sent to Westfield Works by the said James Ramsay, junior, shall continue to be the sole property of the said James Ramsay, junior, subject only to the lien of the said David Hogg Saunders over said material and yarns for the heckling or spinning of the same, or for the advances which he may have made to the said James

(1) 19 Ves. 345; 2 Rose, 182.

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Ramsay, junior, or for debts which in any way the said James Ramsay, junior, may be resting-owing to the said David Hogg Saunders;" and by the 9th article it was provided that—"The said David Hogg Saunders shall be bound, if required by the said James Ramsay, junior, to grant his own acceptances or the acceptances of Messrs. G. Saunders & Sons in the said James Ramsay, junior's, option for a sum not exceeding three-fourths of the market value of the raw material and yarns held by him on account of the said James Ramsay, junior, at Westfield Works, and whether he shall grant his own acceptances or the acceptances of the said G. Saunders & Sons, he shall be entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances."

By memorandum of agreement between the same parties, dated the 25th of June, 1872, they confirmed the previous agreement, and agreed that David Hogg Saunders should extend his works at Westfield, and certain arrangements were made as to rates and division of profits. From time to time Ramsay drew bills upon David Hogg Saunders and his firm of George Saunders & Sons, of which he was the sole partner. In terms of article 9 of the original agreement these bills were discounted by the Royal Bank of Scotland. David Hogg Saunders and his firm of George Saunders & Sons also drew bills upon Ramsay, which were discounted with the Commercial Bank of Scotland. In the month of December, 1878, both Ramsay and Saunders became bankrupt. Ramsay was sequestrated on the 23rd of that month, and David Myles was appointed trustee. George Saunders & Sons and David Hogg Saunders (the only partner of the said firm) stopped payment on the 28th of November, and granted a trust-deed for behoof of their creditors on the 10th of December in favour of the defenders, John Rhind and John Panton, as trustees.

At the date of the double bankruptcy the Royal Bank were holders of bills to the amount of £16,000, drawn by Ramsay and accepted by Saunders on the security of goods in his hands. And the Commercial Bank were holders of bills drawn by Saunders upon Ramsay amounting to £10,637 10*s.* 8*d.* At the date of Ramsay's sequestration there were in the hands of Saunders yarns, &c., of Ramsay's, which were afterwards sold by agreement

of the parties, and realized £4052 14*s.* 2*d.*, which was deposited in the Royal Bank.

To determine to whom the sum was to be paid the holders raised an action of multiplepoinding. The Royal Bank claimed the whole fund in medio as bill-holders, their principal pleas in law being: (1) "The goods in question having by agreement between the drawer and acceptor been specially appropriated to the retirement of the bills in question, and both drawer and acceptors having become insolvent, the claimants as holders of the bills are entitled to have the goods applied towards payment of the bills." They intended to raise by this plea the question whether the facts were appropriate to the application of the rule of *Ex parte Waring* (1), and whether that rule ought to be recognised as the law of Scotland.

Their second plea was as follows: "The goods in question having been specially appropriated to the retirement of the bills in question by agreement among all concerned, including the claimants, the claimants are entitled to be ranked and preferred to the whole fund in medio, in terms of their claim." They averred (cond. 2), the bills to the amount of £16,000 discounted by the claimants were so discounted in the belief founded on the statements both by the drawer and acceptors, that said bills were accepted against stock or other material in the hands of the acceptors belonging to the drawer, and over which the acceptors had and could exercise a lien for all their acceptances to the drawer. In point of fact, it was understood and agreed among all concerned, viz.: (1) the drawer; (2) the acceptors; (3) the claimants, as indorsees of the said bills, that the said stock and other materials in the hands of the acceptors should be specifically appropriated to providing for the retirement of the said bills, and held by the acceptors in trust for that purpose." A proof was allowed of their averments, but the bank admittedly failed to substantiate their second plea or the averments in support of it.

David Myles, Ramsay's trustee, claimed to be ranked to the whole fund. His plea in law being as follows: "The fund in medio being the proceeds of a sale after deducting all charges and

(1) 19 Ves. 345; 2 Rose, 182.

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expenses of manufacturing and otherwise of property belonging to the said James Ramsay, the claimant as trustee on his sequestrated estate is entitled to be ranked and preferred in terms of his claim. But he did not appear in this House, being satisfied of the right of Saunders' trustees to be preferred in terms of their claim." John Rind and John Panton (Saunders' trustees), the respondents, as representing David Hogg Saunders, pleaded

"The said James Ramsay, junior, being the true debtor upon the said £16,000 of bills drawn by him, and accepted by David Hogg Saunders, or his firm of George Saunders & Sons, and discounted with the Royal Bank of Scotland, the lien which the said David Hogg Saunders held over the goods, for which the fund in medio is the surrogatum under the 8th and 9th heads of the above-mentioned original agreement of 1870, and at common law, is effectual to the claimants, and entitles them to operate their relief by means thereof of all payments made by them in respect of the said £16,000 of bills."

A claim was also made on behalf of the Commercial Bank, but their claim being rejected after proof by the Lord Ordinary, was not further insisted in.

On the 20th of January, 1881, the Lord Ordinary pronounced the following interlocutor:—The claim for the Royal Bank, the claim for the Commercial Bank, and the claim for David Myles: Finds that the yarns mentioned in the record were pledged with Saunders & Sons as a security for the obligations undertaken by them as acceptors of the bills held by the Royal Bank: Finds that the claimants Rhind and Panton are entitled to the fund in medio, in order that they may apply it in operating their relief from the said obligations, but subject to the declaration that the balance, if any, is payable to the claimant Myles: therefore ranks and prefers the claimants Rhind and Panton to the fund in medio, and decerns."

The Royal Bank reclaimed against this interlocutor: and on the 15th of June, 1881, the Lords of the First Division adhered, and refused the reclaiming note (1).

(1) The LORD PRESIDENT, after having stated the provisions of the agreement, and the fact of the bankruptcies, and the goods being sold for £4000, continued:—

These goods, of course, belonged in

Two statements were put in by Saunders' trustees, shewing the result of applying their contentions, in contradistinction to that

property to Ramsay and his bankrupt estate; but Saunders and his estate, in virtue of the contract of pledge, were entitled to be indemnified out of the price of the goods to the last farthing of what Saunders or his trustee was made to pay to the holders of the bills.

The holders of the bills had no security whatever over the goods in the hands of Saunders and his trustees.

It seems to be thought by the parties, or some of them, that this state of the facts gives rise to difficulty and embarrassment in the settlement of accounts among the two bankrupt estates and the bill-holders, and so great is this difficulty represented to be, that the Court has been invited, for the purpose of solving it, to import into the law of Scotland a rule of English bankruptcy called the rule of *Ex parte Waring*, introduced by Lord Eldon more than seventy years ago to solve a difficulty which appeared to him to be otherwise insoluble, but of which in this country we have never found the need, because the class of cases to which it is applied in England are with us settled without difficulty on the much more simple and equitable principles of our own bankruptcy system. . . . But the rules of English bankrupt law are in many essential particulars not only inconsistent with those which we follow in practice, but contradictory to them.

But this is not a case in which there arise such difficulties as to induce us to resort to any principles but those which are of constant application in settling accounts in bankruptcy.

Prof. Bell (I. Com., 7th ed. p. 294, 5th ed. p. 275. The last edition revised by Prof. Bell himself), states the principle which must guide us here very clearly in a case closely analogous to the present, and, indeed, identical in its legal character, where goods are consigned by a merchant to a factor for sale, and the owner of the goods is allowed to draw on the factor for a certain proportion of the value, less or more, according to the prospects of the markets. In such a case he says, "If both houses fail while the goods are unsold, and the bills are in the circle, the bill-holder, in the first place, makes claim against each for the amount of the bill, to the effect of recovering on the whole full payment. Secondly, the factor's estate has a lien over the goods to the effect of entire relief and indemnification; and thirdly, the estate of the principal is entitled to demand the goods after such indemnification has been given from the proceeds, or on full security given, to relieve the factor and his estate of the bills."

It will be observed that the bill-holder, having no security over any part of either of the bankrupt estates, is entitled to rank on each of the bankrupt estates for the full amount of his debt (as it stood at the dates of the two bankruptcies respectively, and without deducting any recoveries made since these dates), to the effect of obtaining thereby full payment, but no more, so that if each estate paid a dividend of 10s. per pound, the bill-holder would receive precisely full payment.

The Royal Bank in the present case, ranking for the full £16,000 on the estate of Saunders, will receive a dividend on that amount pari passu with the other unsecured creditors of Saunders. The estate of Saunders will then be entitled to be indemnified out of the price of the impledged goods to the amount of the dividend so paid, and

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of the rule of *Ex parte Waring* (1). It is only necessary to give one statement, and the following is No. 1.

For Saunders & Sons' trustees, shewing the result of applying the contention on the assumption that Saunders & Sons' and Ramsey's estates each paid 4*s.* 6*d.* in the pound.

N.B.—The figures adopted are very approximate, as it is believed that 4*s.* 6*d.*

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the sum thus obtained as indemnity will then become an asset of Saunders' estate, out of which the Royal Bank and the other creditors of Saunders will receive a further dividend, and this process will be repeated until the price or value of the goods has been exhausted. If the value had exceeded the amount of the bill debt, the process would have been continued till the bill debt was extinguished, and the acceptor's liability discharged by full payment, and the balance, if any, of the price or value of the impledged goods would be returned to the estate of Ramsay, the owner of them. But whatever may be the relative amount of the bill debt and the value of the goods impledged, the principle is the same; the subject of the pledge (in strict conformity with the contract of pledge) is applied exclusively to indemnify the pledgee and his estate for what he and it have been made to pay in respect of his liability as acceptor.

No doubt the bill holder in such a case may obtain an incidental advantage from the security that the acceptor has over the drawer's goods. For the bankrupt acceptor and his estate being undoubtedly entitled to resist any demand by the drawer and his trustee to have back the goods till the last farthing of the debt for which he is liable be paid, the bill-holder, to the extent to which the acceptor is enabled to pay by working out his right of indemnity, has indirectly to some extent the benefit of the pledge.

But this result is brought about, not by virtue of any security held by the bill-holder, or of any active title in him to affect the goods impledged, but through the natural operation of the contract of pledge, putting the bankrupt pledgee in a better position to meet his obligation as acceptor than he would have been if he had no such power to indemnify himself at the expense of the drawer and pledger. The result thus brought about does not put the bill-holder in the position of a secured creditor of the bankrupt acceptor or of the bankrupt drawer, nor has he any preference in either bankruptcy. In ranking on the drawer's estate he ranks pari passu with the drawer's other unsecured creditors, and in ranking on the acceptor's estate he gets no more benefit from the proceeds of the impledged goods than the other unsecured creditors of the acceptor.

The result seems perfectly equitable. The subject of the pledge is made available to the estate and the creditors of the pledgee, as an indemnity to the extent to which it and they are made to pay money to the bill-holder in a way precisely corresponding to that in which the pledgee would have been entitled to work out his indemnity if he had remained solvent.

It has been contended that a hardship is thus inflicted on the estate and

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(1) 19 Ves. 345; 2 Rose, 182.

in the pound, the estimate of dividend given by Ramsay's trustee in his evidence, is double what the estate will actually pay.

STATE I.

1. Saunders' Estate.—*Liabilities.*

(1) Creditors other than the Royal Bank, say	£24,000	0	0
(2) The Royal Bank	16,000	0	0
	£40,000	0	0

creditors of Ramsay, the drawer; because if, in conformity with the rule of *Ex parte Waring*, the value of the goods impledged were paid over in slump to the bill-holder, his debt would be to that extent reduced, and he could then rank on Ramsay's estate for £12,000 only in place of £16,000, and also because the mode proposed of dealing with the proceeds of the impledged goods gives to the general creditors of Saunders a dividend along with the Royal Bank on these proceeds at the expense of the creditors of Ramsay.

But the answer to both of these objections is obvious.

1. The payment to the Royal Bank of the £4000 (in accordance with the rule of *Ex parte Waring*), while it would partially satisfy the claim of the bank in other respects, would not prevent them from ranking on the estates of Ramsay and Saunders for their full debt of £16,000, to the effect of operating payment from all sources of not more than 20*s.* in the pound; for it is quite settled that in the case of co-obligants who are both bankrupt, the right of the creditor is to rank on each estate for the full debt, deducting only payments or recoveries made to account before bankruptcy, but not deducting payments or recoveries from any source after the bankruptcy, except only the produce or value of a security held by the creditor before bankruptcy over the estate of the bankrupt: *Robertson* v. *Bank of Scotland* (2 S. 403); *Mein* v. *Sanders* (2 S. 645); *Houston's Executors* v. *Speirs' Trustees* (13 S. 945).

2. The supposed injustice to the creditors of Ramsay is purely imaginary. They are bound by the contract of pledge made by the bankrupt debtor to submit to the impledged goods being made available to relieve the pledgee of all payments made by him to account of the debt of the co-obligants, and the circumstance of the pledgee being bankrupt does not affect the extent or nature of the obligation of the pledger and his estate and creditors. The creditors of the pledgee get the benefit of the pledge, because they come in his place, and are entitled through their trustee to his right of indemnity, and all other legal rights which belonged to the bankrupt debtor.

3. Handing over the £4000 to the Royal Bank would operate most inequitably against the estate and creditors of Saunders, because it would deprive them of all benefit of the contract of pledge, and leave them exposed to a ranking by the Royal Bank for the full debt of £16,000. At the same time they could not have even a ranking in relief against the estate of the principal debtor Ramsay, because the bill-holders being entitled to a ranking for their full debt against that estate, to admit a claim of relief by the trustees of Saunders would involve a double ranking on one bankrupt estate for the same debt. See *Anderson* v. *Mackinnon* (3 R. 608), and authorities there cited.

It is thus clear that the rule of *Ex*

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Assets.

General assets (in which value of security subjects is not included), say	£9000	0	0
(= 4*s.* 6*d.* per pound on liabilities.)			
2. Security subjects, realized value, say	£4000	0	0

parte Waring is not only inconsistent with the best settled rules and principles of our bankrupt law, but if adopted would be of no practical benefit to the creditors of the pledger, and inflict gross injustice on the creditors of the pledgee, and would confer a gratuitous benefit on the bill-holder, to which he has no right, either by law or contract.

The Lord Ordinary has, in the circumstances, preferred the trustees of Saunders to enable them to work out their right of indemnity, so far as the produce of the goods will enable them to do so. In that judgment I concur without the slightest hesitation.

LORD MURE concurred.

LORD SHAND:—

The important question to be determined in this case is, whether the rule of *Ex parte Waring*, which has been in force for upwards of half a century, and is now of constant application in favour of bill-holders in England, is to be introduced in this country. It is clear, and indeed not disputed, that on the facts of this case the law of England would give the Royal Bank, the bill-holders, the benefit of the sum realised for the goods which Messrs. Saunders & Sons held to cover their acceptances to Ramsay, to be applied by the bank in part extinction of the £16,000 debt due to them on the bills in their hands drawn by Ramsay on Saunders & Sons, and accepted by them, and to this extent to reduce the ranking on both estates; and the bank and Ramsay's trustee, on the second alternative of his pleading, have maintained that the law in this country ought now to be declared or applied to that effect. It is argued that the rule in England rests on a clear principle of equity of general application in such circumstances as occur in this case; that if the rule be here applied, justice will be done between all the parties interested; that otherwise a dead lock has occurred which creates an inextricable difficulty, and that any other mode of solving the difficulty will do violence to equitable principles, and produce injustice. If I had been of opinion that the views so maintained were sound, I should have come to the conclusion that although there is no trace of such a rule as is contended for, in our law, and indeed some authority rather adverse to it, yet in the absence of any decision precluding the Court from taking that course, the rule should receive effect in this case, for it is the aim and end of the system of bankruptcy jurisprudence existing in this country to do justice and give effect to principles of equity in the distribution of bankrupt or insolvent estates. But after full consideration of the argument and of the numerous authorities, particularly in the law of England, which were cited, I have formed a clear opinion that the Court ought not here to introduce the rule contended for; that its application in this case would be inequitable, because it would be in violation of the agreement made between the parties; and that, on the contrary, the rule laid down by Professor Bell, the highest authority to which it is possible to appeal in such

3. Saunders' trustees propose, out of the general assets (as above) in their hands, to pay a first dividend of 4*s.* 6*d.* in the pound on all claims, including that of the Royal Bank.

The first dividend payable to the Royal Bank at 4*s.* 6*d.* per pound on £16,000 will be £3600 0 0

questions as applicable to the circumstances which here occur, and which has no doubt been followed in innumerable instances, ought again to be followed now, with the result, as I believe, of carrying out the agreement into which the parties concerned entered and, at the same time, and indeed because of this, with the result also of doing complete justice. [Having stated the averments of special appropriation and the failure to substantiate it, his Lordship continued:—]

In these circumstances it is not possible to maintain successfully that the bank has any title or right to ask that the goods held by Saunders & Sons or the proceeds shall be handed over to them in extinction pro tanto of the bill debt due to them. It has never been said, so far as I am aware, that in such circumstances the bank can plead any equity giving them such a right or claim. To give such a right to the bank would simply be to give them the right to a security for which they never stipulated, and this carrying out the same principle might even be carried the length of giving them the right to a security of the existence of which they were entirely ignorant. Accordingly, Lord Eldon, in *Ex parte Waring*, observed that, "If these bill-holders are to have payment in preference to the other creditors it must be by the effect of an equity between these two parties" (i.e. between the drawers and acceptors) "rather than by any demand directly in their own right." While in the case of *Banner* v. *Johnston* (Law Rep. 5 E. & I. 174) Lord Cairns observed, "It has always been most carefully said that the right of the bill-holder under *Ex parte Waring* is not a right founded on contract; it does not spring out of the contract; but it springs out of the necessities connected with the administration of the two insolvent estates."

If, then, the bank is to obtain the direct benefit of the goods or proceeds of the goods in question, it is not because they have any legal right or claim to it. They would obtain a resulting benefit entirely because, in the settlement of accounts between the two insolvent estates, the interests of the creditors on these estates respectively would be thereby secured. If the trustees on these respective estates, in the interests of the creditors whom they severally represent, should arrange to dispose of the proceeds of the goods between themselves in a way satisfactory to them in the fair discharge of their respective duties, it follows that the bank could not maintain any such direct claim to the proceeds of the goods as they here assert.

The question remains, Are they entitled to the resulting benefit asked because the trustee on the estate of Ramsay, the owner of the goods, demands that the proceeds of the goods should be applied at once to the part payment of the bill debt, so as to reduce the ranking on Ramsay's estate?

The answer to that question seems to me to depend entirely on the terms of the agreement on which the goods were placed in the hands of Saunders & Sons, and I think there is no difficulty in determining what these terms were. The acceptances of Saunders and his

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4. After paying to the Royal Bank this first dividend of £3600, Saunders' trustees claim to have the estate under their administration reimbursed to that amount out of the security subjects held for their relief. If this claim is sustained the sum of £3600 will be restored to the estate, and will be available with any other accruing funds for a second distribution.

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firm were given on the agreement that they should hold the goods in hand at any time as a security in relief of their obligations, or, in other words, to indemnify them for any payments they might be required to make in respect of their acceptances. Although they became acceptors of the bills, it was quite understood and agreed in a question between them and Ramsay that Ramsay, the true debtor, should retire the bills at maturity, and in point of fact he did retire them till his bankruptcy occurred, when the bills then in the circle were dishonoured. The case is not one in which goods were put into the hands of the acceptor of a bill on the agreement that as he was to pay the bill at maturity he should in the meantime sell the goods and apply the proceeds to the purpose of meeting the bill. According to the agreement it was not contemplated that the acceptors should have any payment to make, but if through the default of Ramsay, the drawer, Saunders & Sons, the acceptors, had to make such payment, then they were to be entitled to have recourse to their security for reimbursement.

This being the agreement of the parties, there can be no doubt as to what are their respective rights, or rather, as to what are the respective rights of their creditors according to the law of Scotland, in the circumstances that have occurred. These rights are clearly stated in the passage from Bell's Commentaries which your Lordship has quoted (I. p. 294), and the same view is expressed in a subsequent part of his work, vol. ii. p. 522.

In the first place, in a question between both parties and the bank, they must equally submit to a ranking for the full amount of the bills, for the simple reason that they have each granted a personal obligation, the one as drawer and the other as acceptor for that amount. When, however, the bank obtains a ranking on each estate, it receives all that was stipulated for as the consideration of discounting the bills, viz. the full effect of the personal obligation of each of the parties. The drawer, the owner of the goods, can have no good reason for complaint against a ranking to the full extent, for he not only drew the bills for his own behoof, but actually received the money for them for which the bank ranks. The acceptors must submit to a ranking, because ex facie of the bills they are the primary obligants for their contents.

Again, as regards the acceptors, the goods they hold are not their property, and the trustee for their creditors is no more entitled to throw them into their general estate than they themselves were entitled to do so. He must keep the goods, in terms of the agreement on which they were obtained, as a security merely to indemnify the estate against such loss as may arise to it from the non-payment of the bills and the consequent ranking of the bank, but it seems to me to be clear that he is entitled to keep the goods and apply the proceeds to the last farthing, in so far as necessary to recoup every payment of a dividend made to the bank. When no further payment can be demanded, he is bound to restore to the

5. Assume that there are no other funds available for a second dividend than this £3600. The estate will then pay a second dividend of about 1*s.* 9*d.* per pound.

6. A second dividend at 1*s.* 9*d.* on the Royal Bank's claim will be £1400 0 0

7. Having paid the Royal Bank a second dividend of £1400, Saunders' trustees

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owner the remainder of the goods, or of the proceeds in his hands. There is, I conceive, no difficulty in carrying this out practically in the way described by your Lordship, and shewn in the illustrative states used on behalf of the trustee on Saunders & Sons' estate in the course of the argument, and though in this way and in these states, for the purpose of clearness, it is shewn that after a payment of each of several dividends on the estate of Saunders & Sons, paid out of their own proper funds or estate, recourse is had to the proceeds of the security in order to recoup or reimburse the estate to the extent of the dividends paid to the bank, I do not doubt that a formula could be supplied by an accountant which would simplify the process, so as to admit of the sum to be drawn from the proceeds of the goods being ascertained at once, or, at all events, finally on the payment of a second dividend. It will be observed that in this way the creditors on the estate of Saunders & Sons get no benefit from the goods beyond the security for which their debtor stipulated, and to which he was entitled under his agreement with the owner of the goods. No part of the proceeds is taken possession of and distributed by them as part of the general estate of their debtors liable for their debts. What really occurs is this, that they are relieved of the effects of the bank's ranking in carrying off part of the general estate; for to the extent of the ranking the security is made available. And it is so made available, not by the operation of any special rule in bankruptcy, but simply and solely in carrying out to the letter and in the spirit, the agreement under which their debtor got possession of a security or indemnity fund.

It follows, as regards the owner of the goods, or his creditors in bankruptcy in his place, that their only claim is for the balance of the proceeds of the goods remaining after the security has served its purpose of indemnifying the estate which held the goods in security. It is conceded that the owner or his creditors could only demand the delivery of the goods on securing total relief from the obligations in respect of which they were given over. The concession seems to me to lead directly to the inference that till such relief is obtained, the security-holder cannot be required to part with the goods to the bill-holder or anyone else.

The trustee on Ramsay's estate claims that, in order to give effect to a rule of equity, the proceeds of the goods should be paid over to the bank in diminution of their ranking on both estates. The answer to the proposal is, in my opinion, conclusive, that in asking this to be done, the creditors of Saunders & Sons, who are precluded from ranking on the estate of Ramsay because of the rule against double ranking, are required to forego, to a great extent, the benefit of the agreement under which their debtors acquired the goods, viz. as an indemnity to them against all loss they might sustain through their being called on to pay the debt truly due by Ramsay. I confess I am unable to appreciate the reasoning which can justify this demand on any principle of equity. . . .

It appears to me that the Lord Ordi-

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claim to have the estate under their administration reimbursed to that extent, out of the security subjects held for their relief.

The security subjects being now reduced to £4000—£3600 = £400, Saunders' estate will only recover therefrom £400 of this second dividend of £1400. But that sum of £400 will become available for a third dividend.

8. Assume that there are no other funds available for a third dividend than this £400, the estate will pay a third dividend of about 2½ per pound on the claims.

9. The Royal Bank will receive a third dividend at 2½ per pound, or £160 0 0

10. As the security subjects are already more than exhausted, Saunders' estate will not recover any part of this third dividend from the security subjects. The estate itself will also be exhausted, and no further dividends be paid.

11. The result will be that the Royal Bank will receive in dividends—

£3600	0	0	
1400	0	0	
160	0	0	
			£5160 0 0

Of this sum the trustees on Saunders' estate will have recovered £4000 out of the security subjects, and will have failed to recover the remaining £1160 0 0

This sum will therefore be taken out of Saunders' own estate to the reduction of the dividends drawn by the general creditors other than the Royal Bank.

12. If the rule of *Ex parte Waring* is applied, the Royal Bank will recover the amount of the security subjects £4000 0 0

And will rank on Saunders' estate for £16,000—£4000 = £12,000 only. But as the liabilities of Saunders' estate will thus be reduced by £4000 to £36,000 the dividends which the estate can pay will be increased proportionally to 5s. per pound, and the dividend which the Royal Bank will receive will be £3000 0 0

£7000 0 0

13. On the assumption that Ramsay's estate can pay the same dividends in either view as Saunders' estate, the Royal Bank will receive from Ramsay's estate—

(1.) If the rule of *Ex parte Waring* is not applied . . £3600 0 0
(2.) If the rule of *Ex parte Waring* is applied . . . 3000 0 0

14. The effect therefore will be—

(1.) If the rule of *Ex parte Waring* is not applied the Royal Bank will receive in dividends from Saunders' estate. £5160 0 0
Do. from Ramsay's estate . . . 3600 0 0

£8760 0 0

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nary is right in the view he takes of articles 8 and 9 of this agreement, that it was clearly stipulated that whatever obligation Messrs. Saunders & Sons undertook should be covered by any goods belonging to Ramsay that were to be in their hands.

(2.) If the rule of *Ex parte Waring* is applied the Royal Bank will receive the value of the security subjects .	£4000	0	0
In dividends on Saunders' estate	3000	0	0
In dividends on Ramsay's estate	3000	0	0
	£10,000	0	0
Difference in favour of Royal Bank by the application of *Ex parte Waring*	£1240	0	0
Do. in favour of Ramsay's estate—£3600—£3000=	600	0	0
And Saunders' estate will have to bear the increased burden of £3000—£1160=	£1840	0	0

June 16, 19. *The Lord Advocate* (*J. B. Balfour*, Q.C.), and *Benjamin*, Q.C., maintained for the appellants:—

The decision of the Court below, that the respondents here (Saunders' trustees) should get part of the £4000 equal to the amount of dividends paid, and then that there should be a second indemnity of relief paid out of that, and so until the fund was exhausted, was not equitable to all the parties. The just mode of applying the £4000 would be to pay the bills pro ratâ. There is no rule in Scotland in the case of both drawer and acceptor of the bills being bankrupt, and the question arises for the first time whether the English rule of *Ex parte Waring* (1) should be adopted. That rule was undoubtedly laid down by Lord Eldon in the Bankruptcy Court; but his reasoning is general, and does not apply to any peculiarity of the English bankrupt system. It was based on equitable principles, see remarks of Lord Eldon (2), and if equally applicable to the principles of both countries, it ought to be applied in Scotland as well as in England.

No doubt in *Ex parte Waring* (1), Lord Eldon was dealing with a case where there was enough to satisfy the demands; but in *Powles* v. *Hargreaves*, where not enough, Lord Cranworth in effect said that it was an equity of persons who had no right of their own (3), shewing that the rule was not limited to bankruptcy pure and simple. He says, "The equity on which the bill is framed is rested on the rule of *Ex parte Waring*," and, narrating the circumstances of that case, continues: "The second objection

(1) 19 Ves. 345; 2 Rose, 182.
(2) 19 Ves. at p. 349.
(3) 3 D. M. & G. at pages 447–448, and 452–453.

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(which also presented itself to my mind before it was urged in the argument) is one which I confess struck me at the time as possessing considerable weight, though I have now satisfied myself to the contrary. It is this—It was said that in *Ex parte Waring* (1) the deposit securities were more than sufficient to pay the bill-holder, and therefore the equity was got at in that way," and further on he said, "It was argued that the equity was got at on the assumption that the bill-holders stood in the position of surety, and only through the medium of the principal debtors Bracken & Co., who had made the deposits. Therefore it was said that such an equity could not be applied in this case, because here you cannot take the goods which were deposited out of the hands of the depositees without indemnifying them, that is, without paying the bills in full, which if (as in the present case) the deposits are insufficient for the purpose is not to be contemplated. I confess I was at first a good deal struck with that argument." Then his Lordship mentioned that he had sent for the order itself in *Ex parte Waring*, and continues, "The order itself (which I must assume was very carefully considered, for Lord Eldon directed the attention of Mr. Cooke to the mode in which it was to be drawn up), distinctly provided for the case of short bills deposited either being equal, or more than sufficient, or being insufficient; and expressly provided that if insufficient, the parties holding the acceptances were to prove for the deficiency," and he refers that to a satisfactory principle, because he says, "when as in the present case the goods were deposited under circumstances that the parties with whom they were deposited had a right to hold them as security, it is to be observed from the nature of the transaction, it was meant either by express contract, or in the ordinary course of dealing with the property, that it should be turned into money; when that is done it is absurd to speak of holding £8000 by way of security for being paid £16,000. That is not the course of dealing. When it is once said that goods or bills are deposited by way of security on a contract, that when the proper time arrives those securities are to be realised and turned into money, what is necessarily meant is that the money is then to be applied just as property sold under a power of sale

(1) 19 Ves. 345; 2 Rose, 182.

in a mortgage is to be applied, in liquidating the demands for which it is a security if sufficient, if not sufficient in liquidating such demands pro tanto."

Where a man asks another to be acceptor and leaves property in the hands of the acceptor in case he is called on to pay the bills, he can, while sui juris, say to the acceptor, "hand me back the security and I will pay the bills," or he can say, "sell the security and I will make up the balance." Then Lord Justice Turner gives the case here exactly, "There are two parties liable on bills of exchange. One of those parties holds securities for the payment of the bills. The other party has a right to insist that the property held as security shall be applied to the payment of the bills. He may sue in equity for the purpose of enforcing that right. If he does the security must be applied accordingly. It cannot be applied for the benefit of the general creditor of the party who is bound to indemnify, because the party who is to be indemnified has a right and an interest in the application of it to the indemnity which he has stipulated for; and the consequence therefore is that the proceeds of it must be applied, not to the general creditor of the party who is indemnified, but to the demand, which is indemnified against" (1).

[THE LORD CHANCELLOR:—There is not a word there which is not equally applicable to the rule of the Scotch Courts and *Waring's Case* (2): and the Scotch rule works fuller indemnity.]

The decision of the Court below works monstrous injustice, and would give rise to all the inequities which the rule in *Waring's Case* (2) was adopted to prevent.

The rule of *Ex parte Waring* (2) has been uniformly recognised since its adoption in 1815, and besides the sanction of the Lord Chancellors above named, has received that of Lord Hatherley in *City Bank* v. *Luckie* (3), and Lord Cairns in *Banner* v. *Johnstone* (4).

There is no peculiarity in the Scotch bankruptcy system which prevents the application of the rule. None of the judges in the Court below actually said there was. Bell's Com. 7th ed.

(1) 3 D. M. & G. 458.
(2) 19 Ves. 345.
(3) Law Rep. 5 Ch. 773.
(4) Law Rep. 5 E. & I. 157, at p. 174.

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294 (5th ed. 275), was the single line of authority quoted there. And Bell set out no case, and it should not be set against the long series of cases following *Ex parte Waring* (1). The Lord President said the application of *Ex parte Waring* would not prevent the appellants ranking all the same for the full amount of their debt upon the bankrupt estate of the drawer of the bill, upon the ground that by the law of Scotland no payment after bankruptcy from any source except from a security held before bankruptcy, diminishes the creditor's right of ranking on the bankrupt estate. But the law in England as to payments after proof is the same as that in Scotland: *Warrant Finance Company's Case* (2); and the proper application of *Ex parte Waring* (1) is shewn in the case of *Barned's Banking Co.* (3) It is there explained that the rule proceeds upon the assumption of the security being applied in terms of the contract at the very instant of the bankruptcy, and thus the difficulty suggested by the Lord President does not arise.

The method proposed to be followed by the Court below is not in terms of the contract. By proceeding under the statement lodged by the Respondents the result provided for by the contract, viz., the application of the security to wipe out the liability incurred in respect of the bills, is never attained.

The word "cover" at the end of article 9 necessarily implies a security for the holders. All know what bankers mean by giving cover. The common thing is that the banker says, "I am not to be put out of cash," and the answer is "No; you shall always have cover; that is, all you accept for me, you shall always have remittances in hand to meet." But by this method the security is thus made available to relieve from the dividend and not from the liability on the debt.

[They also cited as undistinguishable *Ex parte Hobhouse* (4), and *Ex parte Perfect* (5) and Eddis, Com. on Rule in *Ex parte Waring*.]

The Solicitor General for Scotland (*Asher*, Q.C.), and *Horace Davey*, Q.C., for the respondents, were not heard.

(1) 19 Ves. 345; 2 Rose, 182.
(2) Law Rep. 5 Ch. 86.
(3) Law Rep. 19 Eq. 1 at p. 9; affirmed, 10 Ch. 198.
(4) 2 Dea. 291.
(5) 1 Mont. 25.

The Lords, having taken time to consider, delivered judgment as follows:—

LORD SELBORNE, L.C.:—

My Lords, this is an appeal in an action of multiplepoinding, arising out of two Scottish bankruptcies, the one of a person named Saunders, who failed in November, 1878, and the other of a person named Ramsay, who failed in December of the same year. These two parties had dealings together, Ramsay sending raw materials (jute, flax, &c.), to Saunders' spinning works, to be converted into yarn, under an agreement in writing, which provided that all material and yarn at Saunders' works should continue to be the sole property of Ramsay, subject to the lien of Saunders for whatever might from time to time be due to him, and that Saunders should give acceptances for a sum not exceeding three-fourths of the value of the raw material held by him on Ramsay's account, and should be entitled to "a right of lien or retention of goods to a value sufficient to cover such acceptances."

At the time of such bankruptcy Saunders was liable as acceptor, upon the footing of this agreement, on bills drawn by Ramsay to the amount of £16,000, and he held goods belonging to Ramsay (since sold for £4025 14*s.* 2*d.*) on which he had a right of lien or retention, to indemnify him from that liability. The appellants are the holders of the £16,000 bills, and, as such, have proved, or have a right of proof, against both the insolvent estates. In the Court below they claimed to have the whole proceeds applied, in the first place, in payment of the bills, as far as they would extend, so as to reduce the amount of their proof against the two estates to about £12,000 instead of £16,000, relying, for that purpose, upon the English case of *Ex parte Waring* (1). That claim was rejected by the Court of Session, from whose judgment the present appeal is brought.

The rule laid down by Lord Eldon in *Ex parte Waring* (1), and confirmed by subsequent decisions of the English Courts, is now well established in England; but this cannot be a sufficient reason why your Lordships should also hold it to be the law of Scotland, unless it can be shewn that its application to the

(1) 19 Ves. 345; 2 Rose, 182.

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circumstances of such a case as the present, in the manner for which the appellants contend, is required by those principles of equity which are common to the jurisprudence of both parts of the United Kingdom. The laws which govern the administration in bankruptcy or insolvency are not in all respects the same in Scotland as in England. The rule in question has not, down to the present time, been received or known in Scotland, though it is nearly seventy years since *Ex parte Waring* (1) was decided. The judges of the Court of Session, whose opinions are now under review, all think that if such a rule were applied, under the circumstances of the present case, it would result in consequences not only not required by any principle of equity, but practically inequitable. After carefully considering the arguments which have been addressed to your Lordships, I am unable to differ from that conclusion.

It is conceded (and it has always been so laid down by all the English authorities) that bill holders cannot claim to have securities, deposited with the acceptors by the drawers for the acceptors' indemnity, applied in payment of the bills by virtue of any right or title of their own to the benefit of those securities. They can, at the utmost, only claim to come in under a jus tertii, availing themselves of the administration of the insolvent estates (in which they have the ordinary locus standi of creditors), to ask that the securities, which would be assets of the one estate but for the lien and right of indemnification belonging to the other, but which cannot be realized until that lien and right of indemnification is discharged, may be so applied as to give effect to the contract between the drawers and the acceptors, in the way most conveniently practicable.

If the securities were sufficient, or more than sufficient, to cover the whole amount of the acceptances, the acceptors would be fully indemnified by the application of those securities to the payment of the bills; and the drawers (or those representing their estate) might in that case be entitled to require that they should be so applied; while, on the other hand, they could not be entitled to reclaim any part of those securities without (in that or some other way) fully indemnifying the acceptors. It may well be that,

(1) 19 Ves. 345; 2 Rose, 182.

under such a state of circumstances, the appropriation of the securities according to the rule in *Ex parte Waring* (1) (both drawers and acceptors being insolvent) might be the most conveniently practicable way of giving effect to the contract between the drawers and the acceptors.

This was in fact the state of circumstances which (so far as an opinion can be formed, either from the report in 19 Vesey, or from that in 2 Rose) was directly in the contemplation of Lord Eldon when his judgment in *Ex parte Waring* (1) was pronounced; and there is an important passage in that judgment which I cannot myself reconcile with the supposition that the equity there stated could have the consequences contended for by the appellants in the present case. I cite it from Mr. Rose's, which seems to me the better report. "It is impossible to deny that if Bracken & Co. had relieved Brickwood & Co. of the acceptances for £24,000, the short bills and the mortgage must have been restored to Bracken & Co. On the other hand, I take it to be equally clear that Bracken & Co. never could have redemanded the short bills or the mortgage without bringing in, under the estate of Brickwood & Co., funds equal to the claim that Brickwood & Co. had in respect of the short bills and the mortgage; for they were first applicable to the discharge of those acceptances, not for the security of the persons in whose hands those acceptances were, but for that of Brickwood & Co., who had become liable upon them. The liability of Brickwood & Co. must be exonerated before any restitution could be claimed by Bracken & Co. That being the nature of the question from the 7th of July, 1810 (the date of Brickwood's bankruptcy), to the 2nd of August, 1810 (the date of Bracken's bankruptcy), the consideration arises how far it is altered by the bankruptcy of Bracken & Co. Now, if the assignees of Bracken & Co. are bound to leave the estate of Brickwood & Co. in the same condition as Bracken & Co. were bound to have done before the bankruptcy (and they certainly would be obliged to put the estate of Brickwood & Co. in that condition, in order to entitle themselves to the securities), I do not see how the bankruptcy varies the question." That is the passage in Lord Eldon's judgment.

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I apprehend it to be clear that Bracken & Co. would not have been entitled, either before or after the bankruptcy of Brickwood & Co., to prescribe in any way to Brickwood & Co., or their assignees, any particular mode of appropriating part of the securities, whether by paying off some (but not all) of the bill holders, or by paying a dividend to all the bill holders, leaving Brickwood & Co.'s estate still liable for the balance, much less could they have done so under such circumstances as those of the present case, in which the securities (though it was the intention of the contract that they should be sufficient to cover the acceptances) fell far short of the required amount. To confer a benefit upon the bill holders, who are no parties to the contract, at the expense of the acceptors, and so to deprive the acceptors, to any extent, of any part of the indemnity for which they have contracted (whether the drawers or their creditors are also benefited by that deviation from the contract or not), must be (as the Court of Session has considered it) inequitable; nor could it be reconciled, in my opinion, with the reasoning of Lord Eldon's judgment.

It is true, as was stated by Lord Cranworth in *Powles* v. *Hargreaves* (1), that the order in *Ex parte Waring* (2), as drawn up, "distinctly provided for the case of the short bills deposited either being equal or more than sufficient, or being insufficient, and expressly provided that, if insufficient, the parties holding the acceptances were to prove for the deficiency." The authority of Lord Eldon in the English Courts of Equity and Bankruptcy was very great; and it is, therefore, in no way surprising that, after the lapse of nearly forty years, the form of order drawn up to carry his judgment into effect should have been regarded as conclusive in a similar case, and should have been (perhaps too readily) assumed to be consistent with the reasons assigned for that judgment. No man could entertain a more sincere respect than I have always done for the very eminent and learned Judge who decided *Powles* v. *Hargreaves* (1); and I assume, for the purpose of the present judgment, that the positive rule of administration, which has been accepted as law in England since the order in *Ex parte Waring* (2) was made, must be understood in accord-

(1) 3 D. M. & G. at p. 453. (2) 19 Ves. 345; 2 Rose, 182.

ance with the determination in *Powles* v. *Hargreaves* (1). But, so far as it is a positive rule of administration, and not the necessary result of equitable principles, it cannot be held to be of force in Scotland merely because it is so in England. Of the reasons assigned by Lord Cranworth (2) to justify the extension of the rule to the case of a deficient security, I cannot but say that they are unsatisfactory to my mind, if applied to such a contract as that between Ramsay and Saunders in the present case; and indeed they appear to me to overlook the fact that, when the whole benefit of a deficient security is given to the bill holder, the estate of the bankrupt acceptor may lose some part of the indemnity to which, by the contract, he is entitled.

If, in the case before your Lordships, the whole fund in medio were applied in the first instance towards payment of the bills held by the appellants, and the appellants were then admitted to prove against both the insolvent estates for the difference, viz., £12,000, the practical result would be, to leave the respondents without any indemnity at all for the dividends which might be paid out of their estate on that £12,000. The result, on the other hand, of the decision of the Court of Session, is to indemnify them to the full extent of the fund (as, under the contract, they have a right to be indemnified) for every shilling which their estate may pay on the bills. Suppose the estate of Saunders to pay a dividend of 5*s.* in the pound, this on £16,000 would be £4000, and the trustee of that estate would have a right, according to the judgment appealed from, to have the whole fund in medio (being, in round figures, £4000) applied for their re-imbursement. But if the fund in medio were first applied in payment of the bill holders, Saunders' estate would then pay on the remaining £12,000 (at 5*s.* in the pound) £3000 without any indemnity at all. Can there be a doubt which of these results is the more equitable? The one violates, the other gives effect to, the contract. What right can the bill holders have to ask that it should be violated for their benefit? What right could the trustee of Ramsay, the debtor primarily liable under the contract, have to ask for any appropriation of the securities which would take away from Saunders' estate any part of the indemnity for which he contracted,

(1) 3 D. M. & G. 430. (2) 3 D. M. & G. at p. 446.

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and at the same time leave that estate liable on the greater part of the bills?

With respect to the argument from convenience, in some possible circumstances (as when the party secured might have no assets of his own, so as to pay any dividend, and yet might for some reason fail to get his discharge, or when he might have assets falling by driblets, so as to pay repeated dividends at uncertain intervals, without exhausting the security fund), it is enough to say that a sufficient practical answer seems to me to be given to that argument in the opinion of one of my noble and learned friends, which I have had the advantage of seeing in print. It is impossible that mere inconvenience or delay in working out the security can make it necessary or just to infringe the contract in favour of persons who are strangers to it.

I therefore move your Lordships to dismiss this appeal with costs.

LORD BLACKBURN:—

My Lords, in this case there were two houses of Ramsay and Saunders & Sons. Saunders & Sons, on the 10th of December, 1878, granted a trust deed in favour of their creditors. Ramsay was sequestrated on the 23rd of December, 1878; so that the estates of both houses were being wound up compulsorily according to the provisions of the Scotch law.

At the time when Ramsay was sequestrated the Royal Bank held £16,000 worth of bills drawn by Ramsay on Saunders & Sons and accepted by the latter house. Saunders & Sons, at the time when they executed the trust deed, had in their possession property of considerable value, which had been deposited with them by Ramsay, subject to the provisions of an agreement made between the two houses on the 22nd of April, 1870. An argument was submitted by Mr. Benjamin that on the true construction of this agreement the holders of the outstanding bills had a specific hold on this property. He relied on the words at the end of the 9th article, that Saunders "shall be entitled to a right of lien or retention of goods, to a value sufficient to cover such acceptances," if I understood him correctly, founding his argument on the assumption that the word "cover," as used by merchants with

reference to a bill, necessarily implied a security for the holders. It may often be used in such a sense, but in this agreement I think it shews no more than that the goods deposited ought to have been kept up to such an amount as would produce more than the amount of the bills current. The goods deposited have been realized, and, either because the parties disregarded that stipulation or miscalculated the value of the goods, instead of producing more than £16,000, they have only produced £4,052 14*s.* 2*d.*, which is deposited in a bank. I think, agreeing therein with all the Judges below, that this agreement gave the holders no security whatever over the goods either in the hands of Saunders whilst sui juris, or in the hands of his trustees. It did give Saunders whilst sui juris a right to retain the goods until he was indemnified against any claim made on him by the holders of the bills, and it left to Ramsay a right to remove those goods and deal with them in any way he pleased, so soon as he had in any way satisfied all claims that were made or could be made upon Saunders, for which he had by agreement a right to retain the goods, but not, except by Saunders's consent, till then. No doubt this considerably increased the probability that the bills would be taken up, and so indirectly gave the bill-holders a better security, but it was only indirectly; if Ramsay and Saunders, whilst sui juris, had chosen to abrogate the agreement of the 22nd of April, 1870, and appropriate the goods to any other purpose they pleased, the holders of the bills could not have prevented them. I do not inquire what rights to compel the realization of the security and the application of the proceeds to taking up the bills Ramsay and Saunders might have had whilst sui juris, for no such question arises. When both the firms came under the compulsory winding-up, the rights which Ramsay and Saunders had, whilst sui juris, passed to the trustees of their estates, who were bound respectively to exercise those powers for the benefit of the creditors of the respective estates of which they were trustees, subject to the control of the Court. The right which the holders of the bills had was to rank as creditors on each of the estates, taking a dividend pari passu with the other unsecured creditors on that estate until they obtained payment of twenty shillings in the pound; they could never take more.

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To apply any part of the proceeds of the goods deposited in security for the benefit of the creditors of the estate of Saunders would increase the dividend on Saunders' estate, and so far as the bill-holder was a creditor on that estate that would be the better for him. It would necessarily make the dividend on Ramsay's estate less than if the whole of the proceeds of that property had been applied for the benefit of the creditors on Ramsay's estate, and so far as the bill-holder was a creditor on that estate, would be the worse for him. Whether on the balance the bill-holder would gain or lose would depend on the proportion which the assets in the two estates bore to each other and to that portion of the property applied for the benefit of the creditors on Saunders' estate. But whether it benefited the holders of the bills or not is not, in my opinion, one of the elements to guide the Court in saying what portion of the proceeds of the security, if any, should be applied for the benefit of Saunders' estate, and what for the benefit of Ramsay's. The Court must act on the rights of the two estates between themselves, and the rules and regulations introduced by the bankrupt law of the country for the administration of such estates.

So far, I think there would have been no difference in the law if this had been an English case; but when the Court comes to determine how the proceeds of the securities are to be applied for the benefit of the two estates according to the rules and regulations of the bankrupt laws of the two countries, there is a difference between what the Court of Session have done and what, since *Ex parte Waring* (1), has been the practice in England.

If we view the matter as it would be when the whole value of the assets forming the estate of the firm holding the security, and also the whole amount of the unsecured creditors, exclusive of the bill-holders, are ascertained, the justice of the case seems plain enough. The creditors of that estate (in this case that of Saunders), exclusive of the bill-holders, can never have a claim to a greater dividend than they would receive if the bills were paid off. If the amount of that dividend on the bills would not exceed the proceeds of the security, the unsecured creditors and the bill-holders should take that dividend, and so much of those

(1) 19 Ves. 345; 2 Rose, 182.

proceeds of the security as will indemnify the estate against the dividend thus paid to bill-holders should be applied for the benefit of the estate, the surplus over that amount being applied for the benefit of the creditors of the other estate. If the proceeds of the security are not sufficient to pay so much they should be applied as far as they will go for the benefit of that estate, and the dividend be reduced to that amount which the estate could pay after that. In that case there would be no surplus to apply for the benefit of the other estate.

It seems to me that this would be perfect equity, remembering that the right of the creditors on the estate against the proceeds of the security is to an indemnity only, and that they have no right to make a profit.

It may, however, be long before these amounts are absolutely ascertained. The Scotch lawyers seem all to agree that the machinery provided by the Scotch bankrupt laws prevents any real inconvenience arising during the period whilst the actual amounts are not ascertained, or at least any of such magnitude or frequent occurrence as to justify an arbitrary rule applicable to all cases. And I am so far from seeing my way to saying that they are wrong in this, that, had it not been for the respect I have for the judgment of Lord Eldon, and of those who have since *Ex parte Waring* (1) acted upon his judgment, I should have said the same thing as to the machinery provided by the English bankrupt laws.

If there is no such difficulty, it seems to me that the creditors ought to administer the estate, applying the funds which from time to time come into their hands in the paying of interim dividends in that manner which will be proper, with a view ultimately when the whole should be ascertained to that result which I have above expressed. And that is, I think, substantially what the decision in this case amounts to.

The rule in England is different. So long ago as 1815 Lord Eldon, in *Ex parte Waring* (1), in such a case directed the proceeds to be treated as if the security had been realised just before the bankruptcy, and the proceeds then applied as far as they would go in paying the bills rateably; if they were not sufficient

(1) 19 Ves. 345; 2 Rose, 189.

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to pay the bills in full, the bill-holders proving for the unpaid portion of their bills; if they were more than sufficient to pay the bills in full, the surplus to be paid to the assignees of Bracken & Co.'s estate, who stood in the position of the trustees of Ramsay in the present case. Such I think, divesting it of the provisions as to repaying dividends already received, is the effect of the order in *Ex parte Waring* (1).

This rule has the unquestionable advantage of being easily worked. The objection to it is that it alters the distribution of the estate from that which it would be if no such arbitrary rule were introduced, which can only be justified on the ground of necessity, or such practical inconvenience in working the administration of the estates as to amount to necessity. And, as was said by Lord Justice James in *Ex parte Smart* (2), "The rule laid down in that case has been often before the Court, and neither the Court nor the Legislature has shewn any disapproval of it." Whether it might be advantageously altered is a matter which might be properly considered by those who have the conduct of the next bill for the amendment of the bankruptcy laws. But there would be very great difficulty in an English Court departing now from a rule so long acted on, even if convinced that it was originally a mistake. This, however, does not apply when a Scotch Court is asked for the first time to introduce the rule in Scotland. The objection to it is that the amounts in equity receivable are disturbed, and I think it can easily be shewn that they always are disturbed by the application of the rule.

If the proceeds of the security are more than enough to pay the bills the application of the rule makes no difference in the amount of the dividend payable to the creditors of the estate who at the time of the sequestration hold the bills, in this case Saunders'; but the bill-holders receive 20*s.* in the pound on their bills, and are so much the better at the exclusive loss of the creditors of the other estate, in this case Ramsay's. Where the amount of the security is less than the amount of the bills the problem is not so simple. The holder of the bill has 20*s.* in the pound paid him on a portion of the bill, and proves on each estate for the balance only. The dividend on the estate of

(1) 19 Ves. 345; 2 Rose, 182.

(2) Law Rep. 8 Ch. at p. 225.

Ramsay is in some cases at least made greater where the assets are unaltered, and the amount proveable is reduced by the application of the rule in *Ex parte Waring* (1). But in all cases where the security is less than the amounts of the bills, which is the present case, the application of the rule reduces the sum payable to the creditors on Saunders' estate; for, though the amount proveable on the estate of Saunders is diminished by deducting the proceeds of the security from the bills, the amount of the assets is reduced by precisely the same sum except where, owing to the smallness of the dividend on Saunders' estate, the whole of the security, though less than the amount of the bills, is not absorbed in indemnifying Saunders' estate for the dividends which have been paid. In that case, however, the assets of Saunders' estate which otherwise would be entirely applied to the payment of Saunders' creditors, exclusive of the bill-holders, are by the application of the rule in part applied to the payment of a part of the bills.

It seems therefore obvious that the result must always be to diminish the amount of the dividend. I have not investigated whether the amount received by the bill-holders is in all such cases increased by the application of the rule; for it is enough to shew that the creditors on Saunders' estate are deprived of a part of what they would be otherwise entitled to. That should not be done unless there is a necessity to do so. If there is none, as the Scotch lawyers all agree that in Scotland there is none, I do not think the judges of the Scotch Court can be asked to pronounce a decision merely for the purpose of producing uniformity with English rules.

I therefore think that the judgment below is right, and should be affirmed.

LORD WATSON:—

My Lords, in dealing with the questions raised in this appeal it is necessary first of all to consider what was the true nature of the so-called right of lien or retention created by the 8th and 9th articles of the agreement of the 22nd of April, 1870. The general purpose of the agreement, which was to endure for ten

(1) 19 Ves. 345; 2 Rose, 182.

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years from its date, unless sooner determined by the death or bankruptcy of either of the parties, was to fix the terms upon which Ramsay, a Dundee merchant, was to supply jute, flax, and codilla, in quantities sufficient to keep the spinning works at Westfield belonging to Saunders in full employment, and also the remuneration which Saunders was to receive for converting the raw material into yarn. It was obviously for the interest of both parties that some financial arrangements should be made in order to enable Ramsay to raise money for fresh purchases of raw material before he had disposed of the manufactured goods. Accordingly it was by the 8th article provided that all material and yarn at Westfield works should continue to be the sole property of Ramsay, subject only to the lien of Saunders for the cost of manufacture and for advances made by him, or other debts due to him by Ramsay. By the 9th article Saunders became bound to give his acceptances for a sum not exceeding three-fourths of the value of the raw material and yarn held by him on Ramsay's account; and it was expressly stipulated that he should be "entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances."

It appears to me that the legal effect of these stipulations was not to authorize Saunders to sell the raw materials and goods in his possession, and to apply the proceeds in liquidation of the bills accepted by him when these fell due, or even to place him in the position of a pledgee, with a power of sale. They gave Saunders nothing more than a right to retain the goods until relieved of his liability as acceptor of the bills. Both parties being solvent, Ramsay would have had no right to demand delivery of the goods, except upon the condition of his first retiring the acceptances against which they were held; and I do not think that Saunders would have been under any obligation to comply with a request by Ramsay that he should sell the goods and apply the proceeds in part payment of these acceptances. It is of the very essence of such a lien, that the party in right of it can deprive the owner of the use and benefit of the subject, till the debt be paid for which it is retained; and, unless the owner makes satisfactory arrangements for relieving him of all liability, he is not bound, either to part with the subject of the lien, or to

comply with the owner's direction as to its disposal. If he pays the whole or part of the debt, he has no right, by the law of Scotland, to sell and repay himself; but, besides a personal action for recovery of what he has paid, he may have his remedy against the goods, either by assigning his lien for a pecuniary consideration, or by applying to the Judge Ordinary for authority to sell as under a contract of pledge. The contract being one of indemnity, he is entitled, out of the moneys so raised, to recoup himself for all that he has paid, or may be called upon to pay; and he is only responsible to the owner for the surplus, if any, which remains in his hands after the debt secured has been fully satisfied.

Saunders became insolvent in November, 1878, and in December he conveyed to the respondents, as trustees for behoof of his creditors, his whole assets, including his right to retain certain goods at Westfield Works, belonging to Ramsay, against bills to the amount of £16,000 which he had accepted in terms of the agreement, and which had been discounted and were then held by the appellants. These goods were subsequently sold, with consent of all parties claiming an interest in them, and the price deposited in bank; and, according to my apprehension, the effect of that conversion was the same as if the goods had been sold by judicial warrant. The respondents' nexus remained, and they were entitled to have the money applied so as to indemnify the estate of the bankrupt for the payments on account of the bills.

Ramsay, by whom the bills were drawn and discounted, became bankrupt in December, 1878, and in April, 1880, the action of multiplepoinding, in which the present appeal is taken, was instituted for the purpose of determining the rival claims upon the fund obtained by selling the subject of the respondents' lien. The appellants maintained then, as they do now, that the fund, which amounts to £5000, or thereby, must be applied in reduction pro tanto of their debt, leaving them to rank for the balance upon the insolvent estates of the drawer and acceptor. The trustee in Ramsay's sequestration claimed the whole fund for distribution amongst the general creditors of the bankrupt, and, alternatively, that it should be applied in the manner contended for by the appellants. The respondents, on the other hand,

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maintained that the appellants must continue to rank on both bankrupt estates for the full amount of the bills, and claimed that all dividends paid by them to the appellants out of Saunders' estate should be repaid to them from the fund in medio, the surplus, if any, after satisfying their claims, being payable to Ramsay's estate.

The Judges in the Court below have unanimously given effect to the respondents' contention. The Lord Ordinary, whose interlocutor was affirmed by the First Division of the Court, has found that they are entitled to the fund in medio, in order that they may apply it in operating their relief from the payments which they are liable to make, in the shape of dividends, to the appellants as holders of the bills, subject to the declaration that the balance of the fund, if any, is payable to Ramsay's trustee.

On the assumption that I have rightly construed the agreement of 1870, I do not think it admits of reasonable doubt that the judgment appealed against is in strict accordance with the principles upon which the bankruptcy laws have hitherto been administered by the Courts of Scotland. In that view of the agreement, the interlocutor of the Lord Ordinary gives effect to the legal rights of the parties. On the one hand, the respondents are permitted to apply so much of the fund as is necessary for the purpose of indemnifying the estate of Saunders for dividends paid upon the bills; on the other hand, Ramsay's trustee gets the full amount of his interest, the reversion of the fund, after that purpose has been fulfilled.

The appellants do not dispute that, by the law of Scotland, they are entitled to rank, for the full amount of the bills held by them, upon the bankrupt estates of the drawer and acceptor, to the effect of drawing 20*s.* in the pound; and they do not assert that, in their own right, they have any claim, legal or equitable, to have the funds applied in reduction of their debt. They maintain, however, that the fact of Saunders' and Ramsay's estates being both insolvent renders it necessary, in order that justice may be done between these estates, that the Court should direct the fund to be appropriated as a payment to account of the bills at or before insolvency. The result of imposing that arrangement upon the parties would be to relieve Ramsay's estate so far, by reducing

the appellants' ranking upon that estate, and to give the appellants the benefit of getting payment in full of part of their debt; but whatever advantage accrued to Ramsay's estate and to the appellants would be balanced by a corresponding loss of indemnity to the respondents.

It was argued for the appellants that it is desirable to have a uniform rule in all cases like the present, and that the principle adopted by the Court of Session would, in very many instances, lead to inextricable confusion, and would, in others, occasion grave inconvenience. It was urged, in the first place, that the system of recouping dividends paid to the bill-holders would lead to an interminable declaration of dividends, each sum recovered by way of indemnity becoming a new fund for division among the creditors; and, in the second place, that, if the indemnity fund were not at once exhausted, the reversionary interest of the creditors of the drawer would lead to his sequestration being indefinitely suspended, in the event of the acceptor being unable to procure his discharge. I agree with the appellants' argument, that one and the same principle ought to regulate all cases like the present; but it appears to me that the difficulties which have been suggested, in regard to the principle upon which the Lord Ordinary's interlocutor proceeds, are not very formidable.

The subject of the acceptor's lien, when converted into money by consent of parties, or by warrant of the Court, becomes a fund to which he may legitimately resort, in order to avoid the necessity of making payment out of his own pocket, and the trustees for his creditors are entitled to use it for payment of dividends upon the debt for which it is retained, in order to protect his estate from the claim of the creditor in that debt. When the amount of the assets available for dividend has been ascertained, nothing can be more simple than to calculate once for all what sum must be taken from the fund in order to obtain indemnity, without resorting to the toties quoties method, which the appellants seemed to consider indispensable. In the present case the respondents have merely to ascertain the dividend which Saunders' estate will yield to creditors other than the appellants, and then pay to the appellants, out of the indemnity fund, a corresponding dividend upon their claim. If the fund prove insufficient for that

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purpose, they will add it to the dividend fund and divide the total between the creditors of Saunders including the appellants. By one or other of these processes the respondents will, uno flatu, obtain the full measure of relief to which they are entitled under the agreement, and no more.

The other difficulty suggested by the appellants is equally devoid of substance. Should the acceptor be unable to procure his discharge his creditors would, no doubt, by the judgment under appeal be entitled to retain their hold upon the fund, in case of future dividends becoming payable from estate subsequently accruing to the bankrupt; and it might be productive of very great hardship and inconvenience if that state of matters necessarily prevented the creditors of the drawer from bringing his sequestration to a close. I cannot, however, conceive why the circumstance that an interest such as Ramsay's creditors have in the fund in medio forms one of the assets of the bankrupt estate should necessarily delay the winding-up of the sequestration. The trustee, with the concurrence of the commissioners, may either enter into a compromise with the party entitled to retain, or he may sell the interest for ready money. It frequently happens that a bankrupt estate consists in part of reversionary, and, it may be, contingent rights; and, when that is the case, it is for the trustee and the commissioners to consider and determine whether it is for the interest of the general body of creditors to realize at once or to prolong the sequestration.

The appellants further argued that, seeing the principle for which they contend was adopted by Lord Eldon in *Ex parte Waring* (1), and has for the last seventy years been recognised as a rule of English law, the same principle ought now to be adopted in Scotland. After the observations which have been made by your Lordships it is unnecessary for me to examine the rule of *Ex parte Waring* (1), which seems to have become an integral part of the bankruptcy law of England. It humbly appears to me that the fact of the existence of the rule in this country is not, per se, a sufficient reason for introducing it into another legal system; and that the appellants must shew that its introduction into the law of Scotland is required, either for the due enforcement

(1) 19 Ves. 345; 2 Rose, 182.

of legal right or in order to meet the necessities or equities of the case. In my opinion no such cause has been shewn. The judgment under appeal gives precise effect to the respective rights of all the parties interested; its application is attended with no practical difficulty or inconvenience; and its operation is not, so far as I can see, inequitable.

The Lord Advocate, in his argument addressed to your Lordships on behalf of the appellants, accepted the view which I have taken in regard to the true import of the agreement, in which I agree with the Court below. It was, however, argued by Mr. Benjamin that, upon a sound construction of the terms of the agreement, the goods were appropriated towards payment of the bills drawn against them; and that it was the right and duty of the acceptor, if the bills, on maturing, were not retired by the drawer, to realise the goods and pay the proceeds to the holders. Had that been the just construction of the contract between Saunders and Ramsay, it would have been quite unnecessary for the appellants to resort to the authority of *Ex parte Waring*. (1) In that case they would have been entitled to a decree, in terms of their claim, according to the existing law in Scotland. The principle of that law, as I understand it, is that effect must be given, in the two sequestrations, to the legal rights of all parties concerned, so long as that object can be attained without practical inconvenience or injustice; and the trustee in Ramsay's sequestration, if Mr. Benjamin's argument had been successful, would have had a clear right to insist that the respondents should, in terms of the agreement, pay over the whole fund in medio to the appellants, in extinction pro tanto of their debt.

On these grounds I am of opinion that the Courts below have rightly decided the present case, and that the interlocutors appealed from ought to be affirmed.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 10th July, 1882.

Agent for appellants: *W. A. Loch.*
Agent for respondents: *William Robertson.*

(1) 19 Ves. 345; 2 Rose, 182.

[HOUSE OF LORDS.]

H. L. (Sc.) 1882 June 15.

WHYTE or HAMILTON and Others . . Appellants;
POLLOK or WHYTE . . . . . Respondent.

Will—Holograph Document, signed and headed "Notes of intended Settlement by"—Ambiguity—Scotch Law.

In the repositories of the deceased who left no other testamentary instrument was found a holograph writing, signed and dated and complete in its testamentary provisions; but headed "Notes of intended settlement by" the deceased. The proof allowed threw no light on the intentions of the deceased:—

Held, affirming the decision of the Court below, that the document was the last will and settlement of the deceased.

Per Lord Watson:—A mere ambiguity occurring in the descriptive title written by the testator cannot qualify the terms or destroy the validity of the document which it professes to describe, when the legal character and effect of the document taken by itself are not doubtful. Such an ambiguity will justify inquiry; but should the parties lead no proof, or should the proof adduced by them be inconclusive, the document must receive effect according to its tenor and substance.

APPEAL from the Court of Session, Scotland.

Walter Whyte of Bankhead died on the 16th of September, 1880, leaving real property to the value of £1500 a year, and personalty worth over £22,000. In his repositories was found the following document:—

"Notes of intended settlement by Walter Whyte of Bankhead.

"Bankhead, 19 June 1873.

"first—I liferent my wife Mrs. Margaret Pollok or Whyte, in my whole estate both heritable & moveable burdened with an annuity of £300 stg three hundred pounds sterling a year to my sister Mrs. Jane Macknish Whyte or Hamilton widow of the late James Hamilton writer in Glasgow should my wife survive me—at the death of my wife said annuity to cease, In place thereof I leave to my said sister Mrs. Jane Macknish Whyte or Hamilton in liferent only and to my nephew John Hamilton

writer in Glasgow in fee my pro indiviso half of the lands of Kenmuir situated in the parish of Old Monkland & County of Lanark, likewise my pro indiviso half of the lands of Shettleston situated in the Barony parish of Glasgow & said County of Lanark—To my nephew James Hamilton I leave my lands of Cuthill & Newmill of Briech &c situated in the parish of Whitburn & County of Linlithgow subject to the liferent of his mother the said Mrs. Jane Macknish Whyte or Hamilton I also leave to my nephew James Frances Watson presently residing at Ardmore House in the parish of Caddross Dumbartonshire, my estate of Bankhead situated in the parish of Rutherglen and County of Lanark, but I wish it expressly understood that in the event of my said nephew James Frances Watson dieing without leaving any lawful mail heir of his body—Then & in that event my said lands of Bankhead are to revert back to my said nephew John Hamilton, my moveable estate at the death of my said wife is to be equally divided between the families of my two sisters Mrs. Frances Killian Whyte or Watson now deceased and the said Jane Macknish Whyte or Hamilton *excluding* (excluding) the males in each of said families—I also exclude the jus mariti of their present or any future husbands And as regards my two nieces Anna Maria Watson or Ewing, and Margaret Buchanan Watson or Ellis, their respective shares are to be handed over to their marriage contract trustees, to be invested by them for the sole behoof of my said two nieces, Anna Maria Watson or Ewing and Margaret Buchanan Watson or Ellis to be altogether quite exclusive of the jus mariti of their present or future husbands I also leave a legacy of £500 stg Five hundred pounds stg to my nephew Walter Whyte Hamilton, said legacy to be paid him by my said nephew John Hamilton from the lands of Kenmuir & Shettleston upon his succeeding to them at the death of his mother Mrs. Jane Macknish Whyte or Hamilton—I likewise leave the sum of One hundred pounds sterling to the Royal Infirmary in Glasgow to be paid free of legacy duty.

Walter Whyte."

The question was, whether this writing was the last will and settlement of the deceased, and entitled to receive effect as such, or whether it was to be treated as a mere jotting, and inoperative.

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The writing was throughout admittedly in Mr. Whyte's handwriting, and was signed by him. It was carefully phrased and disposed of the writer's whole estate with the exception of a pro indiviso share of heritable property of small extent which he had been minded to sell. There was no question as to the interpretation of the provisions, and no question could arise upon it unless for the heading which is prefixed to it.

Mr. Whyte was born in 1813, and married the respondent, Mrs. Margaret Pollok or Whyte, in 1859, but had no children. By ante-nuptial contract he undertook to provide his wife, should she survive him, in an annuity of £400 and the liferent of Bankhead mansion-house, besides a sum for mournings, and the absolute property of his household furniture.

His nearest surviving relations were the appellants, Mrs. Hamilton, his sister, and her family; and Mr. Watson, the son, and Mrs. Ewing, and Mrs. Ellis, the daughters, of a predeceased sister.

The widow, the respondent, sought, in an action of declarator, count, &c., to have it declared that the above document was the last will and settlement of the deceased, Walter Whyte of Bankhead, and must receive effect as such, and that she was entitled to a liferent of the whole estate both heritable and moveable of the said Walter Whyte burdened with an annuity of £300 to Mrs. Hamilton; and that Mrs. Hamilton, as executrix, should produce an account of her whole intromissions with the estate; and pay the balance of her said intromissions; and she called the above appellants as defenders.

The respondent averred inter alia (cond. 5) that the signature was not appended to the document at the time of the document being written, but was done by Mr. Whyte on a day in August, 1880, when he was engaged in arranging his papers; or at least on a day subsequent to the said 19th of June, 1873.

(Cond. 6.) The late Mr. Whyte never consulted any lawyer as to the preparation of any will or settlement and, on various occasions and to different persons, he spoke as if his affairs were regulated by some deed which should be operative as a will.

The appellants in their answers stated their belief that the whole document was written at the same time; and they also

denied that the deceased ever spoke as if his affairs were regulated by will.

They pleaded, inter alia, that the statements of the respondent were irrelevant, and that the document was not a valid testamentary deed.

A proof was allowed by the Lord Ordinary of the facts and circumstances connected with the discovery of the document, and also of any acts or observations of Mr. Whyte tending to throw light on his consideration of the document. Mr. Walter Whyte Pollok, brother in law of the deceased, and a writer in Glasgow, gave evidence that after Mr. Whyte's funeral, he with two other writers examined his repositories. In Mr. Whyte's bed room they found a bureau in which was money and deposit receipts. In another room they found a charter chest, containing title deeds and other valuable documents. And in the deceased's parlour they found a writing desk in which Mr. Whyte wrote all his letters, and the key of which he always kept in his own possession. In this desk, which was locked, they found the above document lying flat, unfolded, amidst miscellaneous documents, vouchers, business letters and bank and cash books. There was no other document of a testamentary character—not even the draft of one. He was constantly in deceased's house when he was alive. But he never spoke to him about making a will; but on one occasion, after 1873, the deceased asked him if he could increase his wife's annuity under the marriage contract which he had written for deceased. And on his telling him he could neither increase it, nor diminish it, but he could give her an additional annuity, the deceased said no more than "Ah."

The only evidence adduced as to the date of the signature, was that of the niece of Mrs. Whyte, who resided with her, who said, that on one occasion in August, 1880, she had seen the deceased bring a paper, like the document in question, down from his bedroom to the parlour, on which paper he wrote something. But all the judges in the Court below were of opinion, on inspection of the document, that the signature had been written at the same date, and with the same ink and pen as the rest of the instrument.

On the 21st of May, 1881, the Lord Ordinary found in favour

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of the appellants, that the document was not the last will and settlement of the deceased, and could not receive effect as such.

The respondent presented a reclaiming note, and on the 13th of July, 1881, the Lords of the Second Division recalled the Lord Ordinary's interlocutor, and found in favour of the declaratory conclusions of the summons. (1)

On appeal,

June 13, 15. The *Lord Advocate* (*J. B. Balfour*, Q.C.), and *Inderwick*, Q.C., maintained for the appellants, that the fact that a holograph writing signed, without witnesses or solemnity of any kind, being a valid form of will in Scotland, made it important that there should be clear proof from its terms, or otherwise, that it was intended to be a will.

The words "notes of intended settlement by," &c., was such an ambiguity on the face of the writing as to let in the presumption that the writing was never intended to be a will, but was merely a memorandum: and its custody amongst old letters, &c., tended to that idea. The respondent, on whom the onus was thrown to remove this ambiguity—she seeking to set up the writing as a will—had failed to do so, or to prove the circumstances she averred; or any circumstances of its being a final testament. Therefore the affirmative which asserts that the document was never intended as a will must have effect. [They cited and commented on *Sutton* v. *Sadler* (2); Williams on Executors (8th ed.), vol. i. pp. 70, 72, 73, and 358; *Goodman* v. *Goodman* (3); *Walker* v. *Steele* (4); *Stainton* v. *Stainton* (5); *Munro* v. *Coutts* (6); *Lowson* v. *Ford* (7); *Cunningham* v. *Murray's Trustees* (8); *Forsyth's Trustees* v. *Forsyth* (9); *Barwick* v. *Mullings* (10); *Hattatt* v. *Hattatt* (11); *Castle* v. *Torre* (12); *Bone & Newsam* v.

(1) 8 Court Sess. Cas. 4th Series, 940.
(2) 3 C. B. N. S. 87.
(3) 2 Cas. t. Lee, 109.
(4) 4 Court Sess. Cas. 1st Series, 327.
(5) 6 Court Sess. Cas. 1st Series, 363.
(6) 1 Dow. 437, at p. 452.
(7) 4 Court Sess. Cas. 3rd Series, 631.
(8) 9 Court Sess. Cas. 3rd Series, 713.
(9) 10 Court Sess. Cas. 3rd Series, 616.
(10) 2 Hagg. Eccl. Cas. 225.
(11) 4 Hagg. Eccl. Cas. 211.
(12) 2 Moore, P.C. 133, at pp. 153, 159.

Spear (1); *Dingle* v. *Dingle* (2); *Mitchell* v. *Mitchell* (3); *Mathews* v. *Warner* (4).]

Sir *F. Herschell*, S.G., and the *Solicitor-General for Scotland* (*Asher*, Q.C.) (with them *Graham Murray*), appeared for the respondent, but were not called upon.

Judgment was given as follows:—

LORD SELBORNE, L.C.:—

My Lords, the question in this case appears to me to admit of no serious doubt or difficulty, and I believe that that is the opinion of your Lordships; and therefore we have not thought it necessary to call upon the learned counsel who appear to support the judgment of the Court below to address us. The sole question is whether this document entitled "Notes of Intended Settlement by Walter Whyte of Bankhead" is, as the Court below have thought, a complete and perfect will of the testator. It is in his handwriting, holograph, and signed by him; and it is not suggested that, if it was originally a will, anything to revoke it took place during his lifetime. The argument has been that on account of the heading and the absence of evidence which would tend to shew that it was meant to be a will, if otherwise that conclusion cannot be arrived at, it cannot be so viewed.

Now I take it that the principles applicable to such questions admit of no reasonable doubt. In the first place I lay it down that it is, in my judgment, a proposition universally true that nothing can receive probate which was not intended to be a testamentary act by the testator. Of course it might happen that something which he did not originally intend to be a testamentary act was converted into a testamentary act by a subsequent and sufficient manifestation of intention on his part; but, either at the time when the act was originally done or at some other time, he must, in a sufficient way, manifest his purpose that it should be a testamentary act. And with regard to all the cases which have been referred to, in which early death, sudden death,

(1) 1 Phillim. 345.
(2) 4 Hagg. Eccl. Cas. 388, at p. 391.
(3) 2 Hagg. Eccl. Cas. 74.
(4) 4 Ves. Jun. 186, at pp. 207, 208; 5 Ves. Jun. 23.

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or anything of that kind, was a material circumstance, I do not at all understand that that circumstance was ever held to make an instrument testamentary which had no testamentary character independently of it. The materiality of that particular state of circumstances arises with regard to instruments of which the testamentary character is deemed to be provisional and qualified; so that the question whether it continued testamentary, as expressive of the last will of the testator down to and at the time of his death, will depend upon the nature and circumstances of the qualification of the original testamentary instrument, with reference to which it may be said to have been provisional.

With that preface I come to the next point, which is this: When you have an instrument in all points of form, and in all points of substance, on the face of it, testamentary, and nothing more is needed to obtain probate of it in England, or confirmation of it in Scotland (I am now, of course, speaking of it as operating upon personal estate), than proof of the mere act; yet if on the face of the instrument there is something to suggest a doubt or a question whether it was in point of fact intended by the testator to be a testamentary act, it is not enough, in order to obtain probate or confirmation, to establish the mere factum of the handwriting or the signature in a case where attestation is not required, but you must do something more, you must put the Court in possession of some extrinsic circumstances which will enable the Court to judge whether it was in point of fact a testamentary instrument or not. Now let me illustrate the reasons why something similar to what here appears in the title, "Notes of Intended Settlement by Walter Whyte of Bankhead," should let in that description of parol evidence. It is not that the Court proceeds upon the assumption that there is some insoluble ambiguity in the instrument because of the existence of such a form of title, but because that form of title suggests the possibility that when extrinsic facts are known they may shew something which will prevent the Court from treating it as a testamentary instrument. Let us suppose, for example, that in the present case evidence had been given to this effect, that on or soon after the 19th of June, 1873, when this instrument bears date, the testator had sent it to his lawyer, with a letter saying, "I wish you to look over this and

to advise me upon it. I have not at present made up my mind whether I will make such a will or not, but I wish, when I have heard from you, to consider it;" that would, I apprehend, if there were nothing more, have been enough to shew that it was not, when it was written, testamentary; and of course it would have been necessary for those setting it up to shew some subsequent act which made it testamentary, which in this case does not appear.

It was therefore held that such extrinsic evidence should be admitted. But the result, my Lords, of the extrinsic evidence which has been admitted is, in my judgment, really nothing. I will afterwards state my reasons for thinking that those circumstances which have been noticed in the Courts below do amount to nothing; but for the present I shall state that that is the conclusion at which I have myself arrived.

Well then, when, after having invited and received such extrinsic evidence as it was possible to offer, the Court finds that no light is thrown upon the matter, what is it to do? It has been argued that any circumstances which lead the Court to receive such evidence throw upon the person propounding the instrument a burden of proof which he fails to satisfy if the evidence is not confirmatory of the testamentary character of the instrument in a positive sense. My Lords, I do not think that there is any such rule; and I am perfectly sure that when the question is examined on principle, no sound principle can be suggested in favour of such a rule. The natural consequence, as it appears to me, of the failure of extrinsic evidence to assist the Court in determining anything as to the character of the instrument, is that the Court will fall back upon the instrument itself, and see what, upon a sound application of that principle, is the construction to be arrived at. It may be that upon a sound construction of the instrument it excludes the idea of its being a testamentary act. In that case of course the only point would be, upon a person asserting its testamentary character, to countervail the apparent character of the document by any sufficient and admissible evidence tending to shew that in point of fact it is testamentary. But, on the other hand, if upon the face of the whole instrument, in the absence of evidence to the contrary, it appears that the

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intention of the testator was to make it testamentary, I am wholly unable to understand upon what imaginable principle you can refuse to construe it as you would construe any other document, and hold it to be testamentary, if the intention of the testator collected from it is sufficiently clear in that direction.

If that is so, the question is whether this particular title is such as to prevent a Court of construction from holding the instrument to be testamentary and continuing in operation as such until the death of the testator, which took place, I think, seven years after its date. That question may be divided into two parts, in this way. First of all, do these words, "Notes of Intended Settlement by Walter Whyte of Bankhead," in themselves import that he did not mean it to be testamentary? If they do, then certainly I should agree with the appellants that that is necessarily fatal to the attempt to make it testamentary, at all events in the absence of proof that by some act sufficient for testamentary purposes he altered its original character. But, my Lords, I cannot for a moment hold that those words negative the idea that he meant it to have a testamentary effect. I will return to an examination of the instrument a little later. I have said that the question may be divided into two parts. I have stated the first; and the second would be whether this instrument imports that, if testamentary at all, it was so only in a temporary and provisional sense, and for a temporary and provisional purpose, which could not be presumed to continue, not having been executed during the period of seven years which elapsed until the testator's death.

I have said that I cannot construe the words as in themselves enough to negative a testamentary intention; and, with regard to the second argument, it is really founded mainly upon English cases (although there is some recognition of the principle of those cases in the judgments given in this House in the case of *Munro* v. *Coutts* (1)), which arose in the English Courts as to imperfect testamentary instruments before the passing of the Wills Act. My Lords, with regard to the principles of those cases, I may say that they seem to me to have, at all events, no application here, unless we first determine, upon construction, that this is, within

(1) 1 Dow. 437.

the sense of those authorities, an imperfect testamentary instrument. The mere form of the title does not itself prove anything of that kind; and I apprehend that what is said by Mr. Jarman in his Treatise on Wills (no doubt not with reference to any particular question exactly like the present, but in a general way) is perfectly true, and true as to wills of personal as much as to wills of real estate. At page 13 of the first volume of the third edition of that work Mr. Jarman thus, I think, correctly states the law, which he proceeds to illustrate by some instances, not similar to the present, but I refer to the passage for the principle: "The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded." There is no reason whatever why what is true in the cases mentioned by Mr. Jarman as to wills of real estate should not be true also as to wills of personal estate.

Those cases of imperfect instruments to which reference has been so much made are thus described, and correctly described, in Williams's book on Executors, at page 71 of the last edition: "The word 'imperfect,' when applied technically to instruments of this nature, means that the document is, upon the face of it, manifestly in progress only, and unfinished and incomplete as to the body of the instrument." I need not read more, because such a description of an imperfect paper seems to me to shew that this is not an imperfect paper in that sense. I will presently consider whether the principle applicable to such imperfect papers may not be extended somewhat further, when you shew that the paper was intended for a purpose which related exclusively to giving present expression to a testamentary intention. And this appears to me to be as perfect a testamentary disposition as I ever saw. The words are all words in præsenti: "I liferent," "I leave," "I also leave," "are to revert back," "excluding," "I also exclude," "are to be handed over," "I also leave," "I likewise

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leave." From the beginning to the end it is perfect in form, perfect in substance, a complete disposition, all in positive words; and I can conceive nothing whatever which remains to be added or supplied for the purpose of the execution of those intentions which are apparent on the face of the instrument; the instrument is absolutely wanting in nothing whatever. Therefore, my Lords, unless you are to extend the doctrine of imperfect testamentary instruments somewhat further by reason of the title, and the title only, this is not an imperfect but is a perfect instrument.

I may also say that the case of Lord Scarborough's will (1) extremely well illustrates what is meant by an imperfect instrument. There were there a number of imperfections in a sense very different from what you have here, there were initials for the names, and every word almost was a symbol; so that to translate it into an intelligible form, intelligible by any one but a member of the family at all events, would be a difficult matter. Nothing could be more clear and obvious than that the instrument was not intended as a testamentary instrument, even if there had not been on the face of it a declaration that it was meant as instructions to his solicitor. It received effect provisionally, but it was an imperfect instrument, coming within this description.

Now it may be, I will not say that it is, because it is not at all necessary to go into a minute examination of the English rule in the Probate Court, and all the particular cases in which it has been applied by the judges of that Court as to these imperfect instruments, but it may be (and for the present purpose I think it fair to assume that it is) fully proved that an instrument as complete as this in point of form and substance may nevertheless be brought within the rules applicable, in the English Court of Probate before the Wills Act, to imperfect instruments, by any matter upon the face of it which shews that it was intended as a preliminary document, as a document looking forward to something else than itself, more perfect and more full, or more formal perhaps, afterwards to be done. For example, there are in the books some cases in which you have such words as "Heads of the will," that was the case in *Bone and Newsam* v. *Spear* (2); or

(1) *Castle* v. *Torre*, 2 Moore, P. C. 133. (2) 1 Phillim. 305.

"Plan of a will," as in *Mathews* v. *Warner* (1); or "Sketch of my will," as in *Hattatt* v. *Hattatt* (2); and still more, "Instructions for a will," or "Instructions to the solicitor." All those headings have a tendency, very much greater than the title in the present case, to warrant the conclusion that although the testator's final intention may have been expressed in the instrument, yet it was not the final instrument which he had it in his mind to execute. "Heads," for example, though I think not necessarily, yet to a certain extent, give the idea that it is a summary, to be extended more fully afterwards. "Plan" and "Sketch" rather more strongly indicate the same notion, and "Instructions" indicate it with precision and in a manner unequivocal. "Instructions for a will" imply that the solicitor or law agent is to be, by some document, instructed to prepare some other instrument. Instruments in all those forms have been held, and I think rightly held, under certain conditions to operate as testamentary acts provisionally, but in view of the execution of a more formal testamentary act afterwards; and that particular character of such acts has led, in the English Courts, to certain conclusions which may be in such cases material, but which do not follow in cases of a different kind. Well, but this instrument falls very far short of any of those forms of expression. You have here, "Notes of intended settlement." The word "Notes," as it seems to me, by no means necessarily implies that something more is afterwards to be done, that it is to be extended by a lawyer. It is not equivalent to "Instructions," or equivalent to shewing that the testator himself is not content to abide by the instrument as a sufficient expression of his intention. It would be almost an absurdity to suppose that the testator means instructions to himself. "Notes" certainly does not signify instructions to any one else; and it appears to me that "Heads" is very much the same as the word "Memorandum." What the testator had in his mind when he used the word "Notes" is certainly to be collected as properly from the instrument itself as the character of the instrument is to be interpreted by the word "Notes." He has set down in this instrument his intended settlement.

Then it is said that the word "intended" implies something to

(1) 4 Ves. Jun. 186; 5 Ves. Jun. 23. (2) 4 Hagg. Eccl. Cas. 211.

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be afterwards done. No. Why the whole language of all the decisions turns upon the testator's intention. The document is one that expresses an intention, which according to all the books is ambulatory, and which is necessarily prospective and future. And therefore the word "settlement" if it stood alone, as it appears to my mind, would naturally, when applied to such an instrument as this, upon the face of it mean, "This is the settlement which I intend to make of my estate after my death"; and I think the addition of the word "Notes" in itself implies nothing more than that he has set it down as such. And I am glad, my Lords, to find that in a case where the word used was not "Notes," but "Memorandum" (which is certainly not more in favour of the conclusion), that view was taken by the learned judge. I am referring to the case of *Barwick* v. *Mullings*. (1) There Sir John Nicholl acted upon exactly the principles upon which it seems to me that your Lordships ought to act now. The words were these, "This is a memorandum of my intended will." It is difficult to conceive anothing more like "Notes of intended settlement," except the difference between the word "notes" and the word "memorandum." Sir John Nicholl says, "In legal consideration this paper upon the face of it being subscribed by the testator would be a finished and perfect paper. The subscribing it would be primâ facie evidence that the deceased intended by that act to give it effect, and that though he began it as a memorandum, yet as he went on to use dispositive terms and finally signed it he altered his mind and converted it into an operative instrument." I hesitate to adopt that language precisely, because it really does not seem to me that either the word "memorandum" or the word "notes" necessarily implies a different intention at the beginning from that which is to be inferred at the end. The learned judge then goes on to say, "more especially as the body of it is not in the handwriting of the deceased; so that the signature could not have been carelessly and thoughtlessly added, but intentionally and upon consideration." That circumstance, no doubt, has not occurred here; but no one can look over this instrument and think that there was anything careless or thoughtless in any part of it. The distinction therefore seems to me under the circum-

(1) 2 Hagg. Eccl. Cas. 225.

stances of no importance. Then he goes on, "Nor is there anything to shew that he intended to do any further act to this particular instrument." Nor is there here. Still the term "'memorandum of my intended will' would raise a sufficient doubt to let in evidence of circumstances whether it was finished in order to have effect, or only as a deliberative memorandum." That is exactly what I say in this case, the words are enough to let in the evidence; but it is quite plain that Sir John Nicholl did not think that if the evidence threw no light one way or the other upon the instrument the presumption was to be against the instrument; on the contrary I should infer the very reverse from what he said.

That being so, it seems to me that there remains certainly no difficulty whatever in the case. One circumstance is to be noted here, namely, that you are not dealing, as in many of the cases which have been referred to, with that which would alter a previously formal and regular testamentary instrument, as to which there is, according to the language used, I think, by Sir John Nicholl, also in the 4th volume of Haggard, in the case of *Blewitt* v. *Blewitt*, a special presumption against the change of such previous regular dispositions by an imperfect instrument. He says, at p. 464 of 4th Haggard, "The strong presumption of law is always adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform acts of disposition." I think, upon looking at the circumstances, it will be found that many of them, if not most of them, are of that character here. There is in the present case no such subsequent instrument, and the effect of raising presumptions against the instrument in question from the title would be to produce a total intestacy and disappoint that which, as plainly as anything could make it, was the intention of the testator as to the settlement of his estate.

My Lords, is there anything in the parol evidence? The parol evidence really contains only three circumstances upon which any observation has been or could be made; first of all, that this document was found, after the testator's death, in a desk where there were some loose papers lying upon it, and a cash book and

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a banker's book. It seems to me that that was quite as likely a place for the testator to keep his will in as any other. At all events I can conceive no circumstance of less importance for the purpose of determining whether the document was testamentary or not. Then it is said that three years, I think, after the date of the instrument the testator asked his man of business whether he could increase the provision made for his wife by a marriage settlement. I am not myself inclined to found much upon that one way or the other; it seems to me to tell quite as much in one direction as in the other. He had done so by this instrument. It was argued on one side that if he had done so he would not be likely to ask such a question, if he understood that it had been done. On the other side it was suggested that it was likely that having done it he would wish to be sure that he had not exceeded his powers, and that his intention would not be disappointed. One way of putting it countervails the other, and it results in nothing. Then there remains a third fact, which, if this had been an imperfect instrument at the time to which I refer, might have been of some importance in the appellants' favour, but which, as it was not so, tends rather the other way, namely, that being accustomed to consult in matters of business a writer to the signet, who was related to or nearly connected with him, he never said a word to him upon this matter. Well, that is rather strong to shew one or other of these two things, either that whatever he meant by that document he certainly did not mean it as instructions to a solicitor to prepare his will, for neither did he communicate with the man whom he was accustomed to consult nor with anybody else; or, on the other hand, if it be fair to construe these words as meaning that they were instructions to some solicitor, then no doubt it would be very difficult to get out of the lapse of time tending to the conclusion that his original intention had been abandoned, and that he meant it provisionally only, and that it could not have been intended to operate down to the time of his death; because, there being an actual change of purpose in that way apparent upon the face of the instrument, it having been meant as instructions to a solicitor, and there having been full time and opportunity, and no solicitor ever having been instructed, there was a departure from the intention to that extent at all

events, and a Court of Probate under those circumstances would assume that there was no such intention at all. That is the principle of what in English cases is called the doctrine of abandonment, a sort of implied revocation manifested. But I am willing to set that circumstance aside. I cannot construe the instrument or the title of it as shewing that it was ever his intention to instruct any solicitor; and therefore it appears to me that at best the circumstance is neutral.

The result is that the evidence is not of any value to assist us in the case; and in my judgment, in the absence of evidence, we must act upon principle. I therefore move your Lordships to affirm the interlocutor appealed from, and to dismiss the appeal with costs.

LORD O'HAGAN:—

My Lords, I am of the same opinion; and the Lord Chancellor has entered so fully into the case that I shall say a very few words to indicate the reasons why I agree with him. In the first place, if we only see that the testator here at all events intended to make a will, and if he has indicated a clear purpose in an intelligible document, it certainly is not our business to be astute in discovering reasons for his intestacy, but rather to help his intention for the settlement of his affairs. I think that that may be fairly considered as the starting point in these cases, always of course taking into account that we must regard the principle of law and the rules of construction; but if we find, within the principle of law and the rules of construction, substantial reason to believe that a will was contemplated, and that a will has been effectually formed, so far as the intentions of the party were really involved, we are not, upon trifling grounds, to set aside the instrument which so indicates his real purpose.

I quite concur with what the Lord Chancellor has said with reference to the burden of proof. No doubt if there be anything like inchoateness instead of completeness, if there be that which is equivocal instead of that which is certain, the burden of proof will fall upon the person propounding the instrument. But in a case like this, where I have paid as much attention as I could to the most able arguments which have been presented to us on

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behalf of the appellants, I can have no doubt in my mind. When I look to the instrument itself, construed apart from the introductory words which were added after the instrument was written, as is manifestly the case, I do not think that it is an inchoate instrument. I think that it is a complete instrument. I do not think that it is an equivocal instrument. I think that it is absolutely certain in its terms, and that being so, it appears to me that there is no question about the burden of proof in the case; but if there be a question, in my opinion the instrument itself sustains that burden abundantly, and there is an end of that argument for the present purpose.

Now let me, in a very few words, just point attention to two or three circumstances which bear home to my mind the conviction that this ought to be dealt with as a completed and perfect instrument indicating the intention of the testator. In the first place, the will is written by himself from the beginning to the end. Looking at the instrument as it is presented to us, nobody can doubt that the signature was made by the man at the time, or about the time, when the paper was completed. It was signed contemporaneously with the document, or at some time shortly afterwards. It appears to me that the will itself indicates abundant intelligence, capacity, and knowledge of what he was about. If one looks to the terms of the will, and looks to the changes that are made in one or two places, I think, in it, and the corrections which have been made, it is perfectly evident that this testator was quite competent to do his own work, and knew perfectly well what he was about and what he did. That, I think, is an important thing when you come to consider other parts of the case. In addition to that the arrangement here, so far as we can judge from the facts presented to us on the part of the appellants themselves, was a perfectly reasonable and right arrangement. It was an arrangement made by a gentleman about sixty years of age, with reference to the members of his family, in an intelligible and perfect fashion. Then we have this further point, that the instrument disposes of the whole of his property with the exception of a very small portion, as we were candidly told, not differing from the case of an absolute disposition. Therefore, if he intended to make a final settlement of his

property, he did so, for he made a final settlement of his property in an intelligible way. Then, in addition to that, we have had a great deal of observation upon the mode in which this document was kept, where it was kept, and so forth. It appears to me that there really is nothing in that, looking to the evidence of Mr. Walter Whyte Pollok, who was related to the testator. All that is stated. I think that the Lord Ordinary spoke of the company of the document as rather impeaching the document itself. But I think that it was in very respectable company, and very important company to the individuals, because, according to Mr. Walter Whyte Pollok, it was in company with the bank book and the cash day book and the vouchers. There were business letters, to be sure; they may have been very important business letters. I do not see why this man should not have kept his will along with his bank book and his cash day book, which vitally affected his business and his fortune. Then we have also the fact that it was kept in a depository of which he had the key, always kept in his own pocket. He never appears, in the seven years during which the instrument remained in that depository, to have parted with the custody of the key; and, if that be so, it is rather an indication, I should say, that the documents which were put there were documents valued by him, carefully to be kept, and carefully kept. Therefore it appears to me, so far as that is concerned, that the evidence of the custody is in favour of the respondent and not of the appellants.

Now there is another circumstance in this case which bears very strongly upon my mind, and that is the length of time during which this instrument was preserved in the place and under the circumstances which I have described, and the attendant circumstances with reference to the people with whom the testator had to deal. For seven long years this instrument, so prepared, with such intelligence, with such completeness, with such apparent satisfaction with reference to the purpose of the testator, remains in this locked desk; there is no change at all, although during those seven years he has the fullest opportunity, supposing that this instrument was intended merely as instructions for a will and not as a will itself, of having it reduced to a formal shape. We have the evidence of the same Mr. Whyte

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Pollok to the effect that this gentleman was in the habit of going into Glasgow every week and calling at the office of a writer to the signet in Glasgow, his own relative, who had been employed by him in other businesses of a legal kind; and yet during the whole of those seven years, having the opportunity any day of submitting this, as it is said, inchoate and imperfect instrument to be completed by a man in whom he had the fullest trust and who was of the greatest competency, he never mentioned it at all. It appears to me that the effect of that is not at all to indicate that he had forgotten what he was about, that he had forgotten what he had done, but that he determined in his own mind that he had done it perfectly well. He may have had the indisposition which many men have to inform people generally, or even their friends, of what they have done in the way of testamentary action—he may have had that feeling—at all events he had the instrument so deliberately kept and so carefully kept. He had the opportunity of communication with competent persons, on whom he had reliance, as legal practitioners; and the fact of his doing nothing of that kind for the whole seven years appears to me to be evidence of deliberate intention, which we cannot possibly put out of our consideration. Besides that, what has been presented as an argument on behalf of the appellants appears to me to tell the other way, with reference to a particular provision for a particular member of his family, which has been pressed upon us. I refer to an arrangement which had been made. If he had had any desire or disposition to deal with the document not as a completed instrument but as an inchoate provision which was afterwards to be carried into effect, no doubt at that time he would, in all human probability, have indicated a desire of that sort, and have had the instrument put in proper shape.

Now these are the circumstances which appear to me conclusively to shew that we are to take the instrument within its four quarters. If there had not been this introductory line, prepared by this man, under what circumstances we do not know, and never can know, could there have been the possibility of saying that there was anything equivocal, that there was anything doubtful, that there was anything inchoate in the matter at all? The words are as positive and as distinct and emphatic and

imperative as any words which can be used. The thing is complete in itself for the purposes of the testator. What is there to indicate to any mind, legal mind or common mind, that it was not his completed and deliberate intention as to the disposition of his whole estate? It appears to me that there is nothing.

That being so, it does not appear to me that there is enough in these introductory words to threw a doubt upon that which, but for those introductory words, would, in my opinion, be absolutely certain. In the first place, what has been said is perfectly true (I am not going into the cases after the discussion of them by the Lord Chancellor), that the Lord Ordinary was justified in putting this matter to proof, because of this apparently equivocal statement (I will not say a word about it at this moment) antecedent to the completed will. What is the effect of that? Its effect is to put upon the parties to give evidence actually of sustainment of the instrument as a will. What has happened? Has there been any evidence given to impeach the will? On the side of the appellants has there been any evidence given which is of the slightest avail for their purpose? In my opinion there is nothing of the sort. I have indicated already the points on which my opinion rests. In my opinion the evidence goes altogether the other way. I mean as to the communication with the solicitor, the company and place in which the thing was found, and the circumstances under which it was found, and the other matters to which I have referred. That is the whole of the evidence which has been called on the question that has been raised upon this document; and that evidence appears to me to go directly in favour of the respondent and against the appellants. Therefore there is nothing in it, in my opinion, to impeach the completeness with reference to the will itself.

Well, but it is said that the heading has that effect. I will repeat what I indicated when Mr. Inderwick was addressing the House, namely, that it does not appear to me at all that this heading is so clear an expression of opinion on the point of the deceased as to raise really a substantial doubt in the matter. If substantial doubt be raised in the matter, in my opinion the thing may be sustained rather than that the question ought to be

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determined the other way. But when you look at these words and see what they are, it does not appear to me that it is necessary at all to say that they cast any doubt upon the completeness and the perfectness of the will. "Notes of intended settlement by Walter Whyte of Bankhead." Now it occurred to me early in the argument that a great deal of the discussion arose upon a misconception of the word "settlement," that the word "settlement" does not necessarily mean a deed which is to be prepared, or a will that is to be prepared. But that this is a Scotch case, I should have said that the word "settlement," according to the habits of people in England and in Ireland ought to be taken in another sense altogether. You would not think of calling a will a settlement in this sense. You may very fairly read it as if the man said, "This a note of the arrangement of all my affairs which I intend to have carried out for the benefit of my family." It appears to me that these words are quite equal to bearing that meaning, and that there is then not a doubt, and is really no sort of question or darkness upon the will itself. I think that they are quite equal to bearing that construction; and if that construction be the right one, cadit quæstio, there is no argument in the case. The case never should have been sent to proof at all. The will itself, in that way, could be perfectly complete and unimpeached and unimpeachable. But if the thing was equivocal, and if the words were capable of bearing the one construction and the other, the construction of the appellants and the construction which I venture to suggest, then I apprehend that we might call in aid that about which there is no doubt and no question, namely, the absolute provisions of the unequivocal will, in sustainment of the will of the man, and for the purpose of carrying out his intention and preventing a defeat of it, and we might say, "We will take a construction which is beneficial to the will, and not a construction which will destroy it."

Taking the whole of the case into account, I confess that but for the fact that there was a division of opinion in the Courts below, I should say that I have no doubt that this appeal ought to be dismissed with costs.

LORD BLACKBURN:—

My Lords, I also agree in the opinion that this appeal ought to be dismissed with costs. The question arises upon a Scotch instrument, and must be governed by the laws of Scotland no doubt; but to a certain extent the laws of Scotland and the laws of England agree in this, that a person has a right to dispose of all his property and to say how it shall be dealt with after his death; within, of course, the rules of law. They also both agree in this, that if he does it with the formalities which are required by the law of the country in which it is being dealt with, that is good and valid after his death. But the formalities in the essential matters which are required by the laws of the two countries are not the same. In England, since the Act of Victoria, since the year 1838, the instrument is required not only to be in writing but to be signed and witnessed. That is not the law in Scotland at all. In England, before the Act of Victoria, as far as regarded personal property, there were some cases, which, as it was before my time, I have never had occasion to look at, and upon which I certainly should not express an opinion without hearing out the argument on both sides. Cases such as that of the Earl of Scarborough's Will (1), which has been mentioned, where a set of intentions on the part of a testator, which would not amount to a will, or which formed an imperfect will, have been held to be good if he died under such circumstances as to shew that he was only prevented by death from making those intentions a perfect will. I am not quite certain that I thoroughly know how that matter was in the Probate Courts before the statute of Victoria. And I do not know whether that was ever the law in Scotland at all; and upon that point still less would I express an opinion. But I am quite clear that in this case no such question arises. If this instrument which the testator left behind him was not a will but was an imperfect instrument, he lived for seven years after writing it, in constant communication with his man of business, whom he was in the habit of employing; and there certainly is not the slightest ground for saying that he was prevented from making it perfect (if it required something to make it perfect), in an unexpected way. I there-

(1) *Castle* v. *Torre*, 2 Moore, P. C. 133.

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fore think that that question does not arise at all; and I express no opinion either upon what was the extent of that doctrine in England, or whether that doctrine was part of the law of Scotland or not. But in Scotland, as I said before, it was not required that the instrument to carry out the deceased's intentions should be witnessed. The common talk of Scotch lawyers, I think, as far as my knowledge goes (being a Scotchman myself), would be to say that that instrument which declares the intention of the testator would be a "settlement." That would be the usual phrase employed; meaning that that is the way in which he settles the disposition of his property after his death. In England, I think, it would be common to say, "That is the way in which he makes his will;" but I think that they both mean the same thing; they mean, that is the effect of his intention as to how his property shall go after his death. It has to be carried out according to the law of the country; and all the judges below agree (and it has not been disputed at the Bar) that if it had not been for the heading "Notes of intended settlement by Walter Whyte of Bankhead," this would have been a most perfect will according to the Scotch Law, properly executed, and perfect in all respects.

The only question then is, what is the effect of the words "Notes of intended settlement by Walter Whyte of Bankhead?" If the testator had written in express terms, as some people did in England before the statute of Victoria, in order to avoid any dispute about the matter, "This is not testamentary, but is merely to be considered by myself, and considered by my legal adviser afterwards," no one could for a moment contend that this would have been a good will; it would not have amounted to a declaration of his intentions so as to be carried out. On the other hand, if he had merely written, "These are notes of my settlement," nobody, I think, could have disputed for a moment that he was using the word "settlement" in the way in which a Scotchman would use the word; meaning simply "This is my last will and testament." As it happens, he has used the words "Notes of intended settlement;" and all the judges below thought (and I probably agree with them, but that is not very material), that that expression is sufficiently ambiguous to permit the admission of extrinsic testimony to shew whether this instrument was only

meant by him as a memorandum of what he intended to have drawn up afterwards (or himself to draw up afterwards), or whether it was a final settlement signed by him.

Now, on that question evidence was given; and I think that if I were bound to go upon niceties, I should say that that evidence rather tends in the direction of supporting the view that this instrument was meant by the testator to be a final settlement. But it so very slightly tends to support that view (I will not go through the evidence again), that I would not act upon it at all. The true way of looking at this case, or, at least the way in which I intend to look at it, is that the whole evidence certainly comes to nothing upon which I would act. That being so, we are brought back to the point, what is this instrument meant by the testator to be, with the words at the top of it, "Notes of intended settlement by Walter Whyte of Bankhead," and then going on, as has been repeatedly pointed out, in the most sensible, straightforward, clear, and business-like manner to express a present intention to give his wife an additional annuity, to give this estate to one and that estate to another; all used in the present tense, and signed by him; which, if it was a mere memorandum, would be utterly unnecessary, but if he meant it to be a final disposition he should sign it, and that would be sufficient. If he meant it as instructions to his solicitor, there might be a reason for signing it as "Walter Whyte"; but then that would have been followed up by sending it to his solicitor.

Looking at the case altogether, my conclusion is (agreeing with the majority of the Judges of the Court of Session, and disagreeing with the Lord Ordinary), that, in the absence of some extrinsic evidence to shew the contrary, this instrument ought to be taken as being a final declaration, duly made according to the law, of what was a settlement of the testator's affairs, to be carried into effect after his death, and that in that sense the words "Notes of intended settlement" should be understood and construed.

LORD WATSON:—

My Lords, the holograph document propounded as the will of the late Mr. Whyte of Bankhead is, if its title be left out of view,

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a complete and well-executed testamentary disposition of the whole heritable and moveable estate belonging to the writer. There would have been no doubt raised as to its validity had not Mr. Whyte written, at the top of the first page of the document, a title in these terms: "Notes of intended settlement by Walter Whyte of Bankhead."

The parties are agreed that the effect of such a title is to admit evidence of all facts and circumstances from which it may be legitimately inferred, either that the writer intended the document to be his last will and settlement, or that he merely regarded it as a memorandum or jotting for his own or his law agent's guidance in framing a formal will. The controversy between the parties is confined to the principle upon which extrinsic evidence is admissible. The appellants contend that it is admitted, because on the face of the writing there arises a doubt as to its true character, which, if not explained, will prevent its taking effect as a will, and accordingly that the party propounding it must fail unless he can dispel the doubt by satisfactory proof. To that argument I cannot assent. The document, taken by itself, is a complete and valid will; and the ambiguous language of the title cannot, in my opinion, deprive it of validity. I cannot understand upon what principle a mere ambiguity occurring in the descriptive title written by the testator can be held to qualify the terms or to destroy the validity of the document which it professes to describe, when the legal character and effect of the document taken by itself are not doubtful. Such an ambiguity will justify inquiry, which may confirm the testamentary character of the document, and may on the other hand lead to the conclusion that the writer intended it to be nothing more than a paper of notes or jottings for the preparation of a will at some future period; but should the parties lead no proof, or should the proof adduced by them be inconclusive, the document must receive effect according to its tenor and substance.

The law appears to me have been laid down as I have endeavoured to state it in the case of *Barwick* v. *Mullings* (1), where the body of the writing propounded, which was conceived in dispositive terms, and was dated and signed by the deceased, began

(1) 2 Hagg. 225.

with these words, "This is a memorandum of my intended will." It is clear to my mind that Sir John Nicholl, although he permitted inquiry, would in the absence of evidence have pronounced the paper to be the will of the deceased. I cannot discover any appreciable shade of difference in the meaning of these expressions, "Memorandum of my intended will" and "Notes of intended settlement by Walter Whyte;" and I do not think the appellants can derive any benefit from the circumstance that the expression occurs in a separate heading or title, and is not incorporated with the dispositive part of the writing, as was the case in *Barwick* v. *Mullings* (1). I have, therefore, come to the conclusion that the writing of the 19th of June, 1873, is primâ facie the will of the deceased Walter Whyte, and that as such it must receive effect, unless it has been proved that Mr. Whyte did not so regard it.

None of the Scotch authorities cited in the course of the argument have a material bearing upon the present case. The case which in its circumstances comes nearest to the present is *Forsyth* v. *Forsyth's Trustees* (2), but there the judgment of the Court was rested upon these facts; first, that the writing, which was alleged to be a holograph codicil to a formal trust disposition and settlement previously executed by the deceased, was incomplete, inasmuch as there was a blank space on the paper, which had the effect of leaving the bequest undisposed of in an event for which the writer would presumably have provided in any final expression of his intentions; secondly, that it was headed "Draft of a codicil," and that the writer had on previous occasions employed his professional adviser to prepare a formal deed from instructions prepared by himself; and lastly, that it was not found in the deceased's repositories, along with his general deed of settlement, but in an open drawer in which he kept his wearing apparel.

If upon the evidence led in this case I had come to the same conclusion with the Lord Ordinary, I might have hesitated to assent to the judgment of the Inner House. His Lordship held it to be established by the proof that the late Mr. Whyte had, in the year 1877, a conversation with his law agent which indicated that according to the belief of the deceased he had not at that time made any addition to the provisions settled upon his wife by

(1) 2 Hagg. 225. (2) 10 Court Sess. Cas. 3rd Series, 616.

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their antenuptial contract of marriage; and also that the place where the writing was found after his death was inconsistent with the idea that it had been preserved by him as a testamentary writing. I cannot agree with either of these conclusions. The terms of the conversation in 1877, as related by Mr. Pollok, are consistent with the supposition that Mr. Whyte was desirous to ascertain whether the document which he had previously written and signed would be effectual; and the fact that the document was found in the private desk of the deceased, which was always locked, and of which he constantly kept the key, cannot, in my opinion, cast any discredit upon it. The evidence appears to me to be almost neutral in its character. It does not afford any decisive indication of the deceased's understanding and belief that he had made a will; and it as little suggests the inference that he understood and believed that the writing of the 19th of June, 1873, was a simple memorandum or note of instructions.

I am accordingly of opinion with your Lordships.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 15th June, 1882.

Agents for Appellants: *Grahames & Currey.*
Agents for Respondent: *Connell, Hope, & Spens.*

[HOUSE OF LORDS.]

THE EARL OF ZETLAND . . . . . APPELLANT;
HISLOP AND OTHERS . . . . . RESPONDENTS.

H. L. (Sc.)
1882
June 12.

Superior and Vassal—Restrictions in Feu Charter not to sell or retail any kind of Malt Liquor in Houses erected on the Feu—Relevancy—Interest.

A restriction in a feu charter, purporting to bind not only the original contracting feuar and his heirs, but also his assignee or any tenant or possessor of the houses to be erected on the feu, and power to enforce or dispense with it, is given not to the disponer or his heirs, but to the superior for the time being; the restriction, unless repugnant to the nature of the estate taken by the feuar or to public policy, is a condition of the feu, and runs with the land against singular successors.

In all cases of restrictive conditions in a feu charter, the superior must have power to enforce them, or to dispense with them according to his own will or not, whether the charter is so expressed or not, unless the benefit of them and the right to enforce them are communicated to other feuars.

A restraint against carrying on the trade of a publican is as good in law, and as capable of running with the land, as a restraint against carrying on any other business; and the fact that restrictions are placed by statute upon the freedom of that particular trade constitutes no reason why a private contract to prevent it from being carried on, without the consent of the superior, should be held invalid or contrary to law.

Feu rights of land in Grangemouth, a town of 5000 inhabitants, contained restrictions against retailing malt or spirituous liquors, or allowing the same to be sold or retailed within the buildings erected on the feus without the superior's permission. The superior sought an interdict to prohibit the defenders, the feuars, from continuing to sell any kind of malt or spirituous liquors, &c., alleging that the whole of the town was built on ground held of him as superior; that he was proprietor of certain houses in the heart of the town at a rental of £750; that he had still a large extent of ground in and adjacent to the town available for feuing, and that his mansion-house was within half a mile of the town; and that these properties were damaged by the existence of so many public-houses. The defenders pleaded no interest to sue the action, acquiescence, and prescriptive use. On the question of relevancy:—

Held, reversing the decision of the Court below, first, that the restrictions sought to be imposed were not personal, or inconsistent with public policy, nor repugnant to the pursuer's estate, they relating to the use and employment of buildings erected on the land; secondly, that the interest to sue the action was connected with patrimonial rights, and that the superior's case, as shewn on the record, was sufficient to entitle him to the relief which he prayed:—

Held, also, that it was the plain intention of the contracting parties that the superior should determine, whether there are to be public-houses upon any

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of the feus, and if so, their number and position, and accordingly the superior in granting his license to certain feuars to sell liquor was in no sense departing from or waiving the prohibition. But it was a different question in all or some of the cases, whether the pursuer might not be seeking to enforce the restrictions under circumstances, or in a manner, which ought to deprive him of the assistance of the Court, there being facts averred, from which, if proved or admitted, it might be legally inferred that successive superiors had so acquiesced in the feuars' use of their premises for the sale of liquor that the prohibition must be held to have been unconditionally discharged. But the record leaving it open to the superior to adduce evidence which might give a different colour to these facts, the parties must proceed to proof before the questions of acquiescence and waiver, and prescriptive use, could be decided.

Per LORD WATSON:—Though *Tailors of Aberdeen* v. *Coutts* (1 Rob. App. Cas. 296) does determine, that the superior cannot enforce a restriction on property, unless he has some legitimate interest; that case does not lay down the doctrine, that an action at the superior's instance, which merely sets forth the condition of his feu right and its violation by the vassal must be dismissed as irrelevant, because the Pursuer has failed to allege interest. The vassal in consenting to be bound by the restriction concedes the interest of the superior, and therefore the onus is upon the vassal, who is pleading a release from his contract, to prove that any legitimate interest which the pursuer may originally have had in maintaining the restriction has ceased to exist.

Tailors of Aberdeen v. *Coutts* (1 Rob. App. Cas. 296) followed.

APPEAL from interlocutor of the Court of Session in Scotland.

The Earl of Zetland is proprietor of the barony of Kerse in the county of Stirling. Upon part of that barony is built the town of Grangemouth.

Sir Lawrence Dundas, the Earl of Zetland's ancestor, commenced the town in the last century, and it has now grown to be a considerable shipping port with a population of 5000 inhabitants, the population having doubled within the last fifteen years; and by adopting the provisions of the *General Police Act* of 1862 it has become a police burgh with municipal government.

The Earl of Zetland is himself proprietor of a number of houses in the town, and all the rest of the houses in the town are built upon feus which are held of him as superior.

This action was brought by the Earl of Zetland against four feuars, namely, Hislop, Webster, and Rankine Carmichael, and others, and McArthur and others, the respondents, concluding in each case for an interdict to prohibit the defenders from selling or retailing any kind of malt or spirituous liquors, or allowing the same to be sold or retailed within the buildings erected on their feus.

The feus were granted out in 1801–1811, 1814, and 1822, respectively, and each of them contained a restriction against selling malt and spirituous liquors.

The feu right possessed now by Hislop (which was taken as the test case to decide the question on relevancy), was granted on the 27th of September, 1814, by Thomas Lord Dundas, the predecessor of the Earl of Zetland, to James Simpson, and his heirs and assignees whatsoever. The first condition of that feu right was to the effect that two good and substantial dwelling-houses of a specified character and size, were to be erected before the term of Whitsuntide, 1816, and were thereafter to be kept in good habitable condition and repair, and rebuilt when necessary. The second condition declares that "It shall not be lawful for the said James Simpson, or his aforesaids—(his heirs and assignees whatsoever)—or any tenant or possessor of the buildings to be erected" on the land feued "to carry on the business of candle making, coppersmiths, blacksmiths, slaughtering or butchering of cattle, or any other trade, manufacture, or occupation, that shall be deemed nauseous, troublesome, or dangerous to the neighbourhood by the superior or his baron bailee, who shall have power to determine thereon, and whose judgment shall be final; nor shall it be lawful for them to build public brewhouses, or bakers' ovens in or upon any part of the premises, at least fronting the street, without prejudice always to them to brew or bake within the same for their own private use allenarly." Then follow the words which have given rise to the present litigation—"Neither shall it be lawful for the said James Simpson, or his aforesaids, or any tenant or possessor of the said houses, to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating houses, unless he shall obtain permission in writing to that effect from the superior."

The fifth condition declares that nothing contained in the disposition of the feu "shall be so construed as to prevent me, or those succeeding to me from making any alteration we may judge proper, upon the general plan, articles, and regulations for the town of Grangemouth, nor oblige us to adhere to the same in granting after feus, within the said town." The remaining conditions, which comprise a prohibition against subinfeudation,

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conclude with an express provision and declaration, that the whole burdens, conditions, provisions, and irritancies expressed in the deed shall be inserted in the vassal's infeftment, and in all subsequent deeds and titles transmitting the right, otherwise the same shall be void and null.

In all the feu rights granted by the Earl of Zetland and his predecessors the same prohibition against the sale of spirituous liquors which occurs in Simpson's title has been inserted; with this exception, that, in the many feu rights given off within the last thirty years, the prohibition is limited to sale for consumption on the premises and does not extend to the retail of liquors under a grocer's licence.

In 1880 the number of licensed houses in Grangemouth had increased to fourteen, consisting of two hotels, seven dram shops, four grocers' shops, and a restaurant. The building on the ground feued to Simpson had at that time been duly licensed as a public-house for thirteen consecutive years.

The Earl of Zetland in January, 1880, caused notices to be served upon the proprietors and occupants of the seven dram shops (among whom are the respondents) intimating that the prohibitions in the feu rights against the sale of malt and spirituous liquors would be put in force on and after the 15th of May, 1880. Notwithstanding this notice, five of these dram shops, being the five public-houses embraced in the proceeding (two being situated on the same feu), applied for and obtained renewal of their licenses for the year from the 15th of May, 1880. Under these circumstances the Earl of Zetland commenced on the 22nd of June, 1880, four separate actions by summons against the respondents, concluding to have it found and declared that the condition of the original feu right is binding upon them, and for interdict against their selling or retailing any kind of malt or spirituous liquors, or allowing the same to be sold or retailed within the said buildings.

John Hislop acquired in 1879, by a singular title, the subjects feued to James Simpson, and he is now infefted in them subject to all the burdens and conditions expressed in the original feu disposition. And in this case of Hislop, permission to sell malt and spirituous liquors had been given in writing by the pursuer

in 1868 to Hislop's predecessor but with an express reservation enabling the pursuer to enforce the prohibition at any time without giving any reason for doing so.

In his condescendence before the Lord Ordinary the appellant did not allege any interest which he had to enforce the condition of the feu contract. He simply set forth his title as superior, and his resolution to require the feuars to submit to the restrictions. The respondents stated the preliminary plea that the appellant "had no title or interest to sue."

On the 4th of November, 1880, the Lord Ordinary pronounced in Hislop's case an interlocutor finding that the pursuer had not set forth any interest to sue the action; and dismissed the action with expenses against the pursuer. Similar interlocutors were pronounced in the other actions.

The pursuer reclaimed; and the Court below (January 7, 1881) allowed all the parties to amend their pleadings. And the four actions were conjoined.

The pursuer in his amended condescendences, after setting forth the respondents' respective tenures in the four actions, averred:—

(Cond. 10.) "The town of Grangemouth was commenced about a century ago by the pursuer's ancestor Sir Lawrence Dundas, who built a number of dwelling-houses in what is now the heart of the town. These houses, which yield an annual rental of about 750*l.*, now belong to the pursuer. The whole of the rest of the town is built on ground held of the pursuer as superior, and he still has a large extent of ground in and adjacent to the town available for feuing, including upwards of 140 acres within the burgh boundaries. The pursuer's mansion-house of Kerse is also within half a mile of the town, and his policy grounds extend considerably nearer to it."

(Cond. 11.) "The existence of so many public-houses as there at present are in Grangemouth, including the premises embraced in the summons, and the prevalence of drunkenness thence arising, are detrimental to the value of the pursuer's property above referred to, and seriously interfere with the comfort and well-being of many of his tenants and feuars, besides being prejudicial to the comfort and amenity of his mansion-house and policies."

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The respondent Hislop averred:

(Stat. 3.) In the course of the town's growth the restrictions against particular trades and against particular modes of using the feus, contained in most of the older feu charters granted by the superior's predecessors, have been found unsuitable, and these restrictions have been habitually disregarded and abandoned for many years, in all cases with the full knowledge, assent, and acquiescence of the pursuer or his predecessors, and in some cases with their or his express written consent. In this way coppersmiths and blacksmiths' shops, bakers' ovens, the slaughtering of cattle, eating-houses and victualling-houses, ship chandlers' shops, and other trades or occupations, all of which are prohibited by the original feuing restrictions, have for many years existed in the town. The particular prohibition now founded upon by the pursuer, "to sell or retail any kind of malt or spirituous liquor" had been for time immemorial prior to January, 1880, waived, and public-houses had been in some cases expressly consented to, and in all cases with full knowledge acquiesced in by the pursuer and his predecessors."

(Stat. 7.) "The pursuer and his predecessors have acquiesced in the occupation of the defender's subjects as a public-house for thirteen years, and it was with the pursuer's predecessor's consent that such use and occupation began. The circular of January, 1880, was the first intimation received by the defender of any objection on the pursuer's part. The defender's public-house is productive of no injury to the pursuer's estate, and in no way harms any property belonging to the pursuer. The pursuer has no interest to enforce the prohibition now founded upon by him, and his present proceedings are nimious and oppressive, &c."

The pursuer answered: (3.) "Admitted that certain coppersmiths and blacksmiths' shops, eating-houses and victualling-houses have for many years existed in the town with the consent of the pursuer and his predecessors; also admitted that certain public-houses also existed for different periods prior to 1880, with their knowledge," &c.

(Ans. 7.) "Admitted that the late Earl of Zetland consented to the premises in question, which then belonged to Mr. Alexander Thomson, being licensed in the year 1868. Explained that the

consent was given in a letter by the agents for the said Earl, addressed to Mr. Thomson, dated the 10th of April, 1868, but which contained an express reservation of the right of the said Earl and his successors to enforce the prohibition against the sale of malt and spirituous liquors at any time, and without being bound to assign any reason for so doing."

The pursuer pleaded:

"The prohibition against the sale of malt and spirituous liquors within the premises described in the summons is a legal condition of the feu enforcible by the pursuer as superior against the defender as proprietor thereof and his tenants."

The defender Hislop pleaded:

(1.) The pursuer had no title to sue.

(2.) The prohibition founded on does not warrant the present summons in respect of (*a*) Consent and acquiescence on the part of the pursuer and his predecessor in the use of part of the house as a public-house; (*b*) Waiver and abandonment by the pursuer and his predecessors for forty years and upwards of the like prohibitions in other feus;

(3.) The prohibition founded upon is not a real burden, nor is it binding upon the defender as singular successor in the feu.

In the action against Webster and Rankine they averred:

(Stat. 4.) The subjects which now belong to the defender Richard Webster were feued out by the pursuer or his predecessors to Archibald Mitchell in 1811. A building was shortly thereafter erected, and premises thereon used and occupied as a public-house for a considerable number of years immediately subsequent to 1812, without objection on the part of the superior. After an interval of some years they were again licensed, and have been occupied as a public-house for the last thirty years.

The pursuer, in his answer, admitted that part of the dwelling-house had been occupied as a licensed public-house for about thirty years.

(Stat. 7.) "The pursuer and his predecessors have acquiesced in the occupation of the defender's subjects as a public-house for forty years and upwards, and it was with their consent as superior that such use and occupation began," &c.

Answered, for the pursuer "Denied."

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In the action against petitioner Carmichael (trustee) and T. Wilkinson:

They averred: (Stat. 4.) "The subjects which now belong to the defender Carmichael as trustee . . . were feued out by the pursuer or his predecessors to George Carlaw in 1822. A tenement was shortly thereafter built, part of which, being the ground flat, has been used and occupied as a licensed public-house for upwards of fifty years."

The pursuer, in his answer, "denied that part of the said house has been occupied as a licensed public-house for upwards of fifty years, and explained that for several years prior to 1866 the tenant had only a grocer's license."

In the action against Margaret McArthur and others, they averred:

(Stat. 4.) "The ground now belonging to the defenders, Misses Margaret and Jane McArthur and Miss Storie, was feued out by a predecessor of the pursuer to William Glen in 1801. Buildings were shortly thereafter erected thereon, a portion of which now belonging to the defenders Misses McArthur has been occupied as a public-house from shortly after the date of erection, and, at all events, for sixty or seventy years, without any objection and with concurrence on the part of the superior. Another portion of the buildings now belonging to defender Miss Storie was occupied for many years prior to 1827 by Miss Jane Duncan, aunt of the defender Miss Storie, and who had acquired the subjects by purchase from the original feuar, Mr. Glen, as a ship-chandler's shop, and she, during that time, held a license for the sale of spirits and malt liquors in said premises. After an interval of some years the premises were again licensed, and they have for the last thirty-three years been continuously occupied as a public-house by successive tenants, without objection and with concurrence on the part of the superior."

The appellant, in his answer, admitted that one part of the feu was occupied by a public-house for sixty years and another for thirty years. Quoad ultra denied.

On the 18th of March, 1881, the Second Division of the Court of Session adhered to the Lord Ordinary's interlocutors. The Lord Justice Clerk being of opinion with the Lord Ordinary that the

pursuer was endeavouring to enforce the restriction, not for the protection of his own patrimonial interest, but in order to give effect to his views of the moral and social well-being of the community of Grangemouth. Lord Young considered that the restriction sought to be enforced by the pursuer was repugnant to the nature of the feuars' estate, and therefore invalid in law. Lord Craighill thought the restriction inconsistent with public policy (1).

On appeal,

April 21, 24, 25. The *Solicitor-General for Scotland* (*Asher*, Q.C.), and *Benjamin*, Q.C., for the appellant:—

This case was decided in the Court below on the question of relevancy, and taking the case of the respondent Hislop as ruling the rest, they maintained that he having accepted the conveyance on the same terms, and with notice of the condition, was bound under the restriction just as much as his predecessor Simpson was. He was sued not quâ singular successor but quâ contractor, and both under the law of Scotland and England was liable to the enforcement of the condition, whether it ran with the land or not.

As to the legality of the restriction,—the superior having given off the feu retains to himself the dominium directum, the highest and most eminent right, and gives off the dominium utile as being subordinate to the other: Erskine, 2, 3, 10.

It was impossible to draw a distinction between building restrictions and those on certain trades. It was trite law that the superior may impose such convential conditions and restrictions as are not unlawful or inconsistent. And the cases established the legality of the condition here. In *Andrew Lauder* (2), under a prohibition against any works that can be reasonably considered as nuisances by the public, the slaughtering of cattle was restricted: see also *Porteous* v. *Grieve* (3). Under a restriction not allowing any alehouse or public-house to be erected, held applicable to a hotel: *Scot* v. *Cairns*. (4). In *Tailors of Aberdeen* v. *Coutts* (5)—the leading case on feuing restrictions—in the judgment, alleged

(1) 8 Court Sess. Cas. 4th Series, 675.

(2) 16 June, 1815; 18 Fac. Coll. 450.

(3) 1 Court Sess. Cas. 2nd Series, 561.

(4) 9 Court Sess. Cas. 1st Series, 246.

(5) 1 Rob. App. 296, at p. 306.

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to be written by Lord Corehouse, it was said that to be effectual against singular successors the restriction must be constituted by express words in the conveyance which clearly expresses that the subject itself is to be affected, and not the grantee and his heirs alone. These conditions they had here. And further on the judgment quoted (1) with approval *Brown* v. *Burns*, where held that a superior may introduce conditions which are legal, and which cannot be dispensed with but by the superior's consent, though there the Court decided that they could not be enforced as the superior had allowed them to be generally departed from. In *Harley* v. *Campbell* (2), the Court of Session having found that a clause in a feu charter, declaring that all conveyances of the allotted land should be made out by the superior's agent, or else be void, was enforceable, this House remitted the cause for review, and for the opinion of all the Scotch Judges. But the superior took no further steps to obtain a decided opinion (3); that case therefore was open to doubt. There Lord Gillies said: "If this stipulation is good I do not know of any stipulation that can be bad, for it is purely a personal obligation;" but here the ground was conveyed under the obligation that it was not to be put to certain uses. In *Skinner* v. *Diey* (4) feuars were obliged to erect buildings conform to plan. In *Campbell* v. *Ewing* (5) the feu charter provided that no buildings except dwelling-houses should be built on the lands feued, and that the feuars and his aforesaids should not allow to be kept upon the said feu any public-house or tavern, or carry on any kind of work or manufactory thereon which might be considered to be a nuisance by the superior or feuars. It was there assumed that this was a valid condition; and the only questions the vassal attempted to raise were (1) whether a hydropathic establishment came under the designation of a public-house or tavern; and (2) whether the superior had barred himself from insisting on the restriction by reason of his having granted a relaxation of it in the case of another feuar. It was held he was not barred. In *Ewing* v.

(1) 1 Rob. App. 296, at p. 309.
(2) 1 Will. & Sh. 690, at p. 702.
(3) 6 Court Sess. Cas. 1st Series, at p. 680.
(4) 18 Court Sess. Cas. 2nd Series, 158.
(5) 5 Court Sess. Cas. 4th Series, 230.

Hastie (1) a condition that the houses should be used as private dwelling-houses was enforced against one feuar who sought to use one of the houses as a lady's school, at the instance of conterminous feuars. In the case of *Gold* v. *Houldsworth* (2), which was a lease, but of the long term of 999 years, the lessee, her heirs and assigns and successors, were prohibited from keeping a public-house without special licence from year to year from the proprietor under pain of certain penalties. Fifty-five years after the date of the original lease, a question arose whether the successor to the original lessee was entitled to disregard the prohibition on payment of the penalty. It was assumed that the prohibition was valid; and in judging of the legality of this condition, a lease of such duration is equivalent to a feu.

The law in England is similar. In *Whatman* v. *Gibson* (3) an injunction was granted against a man using a house as an hotel, who had purchased the ground it stood on with notice of a deed of covenant containing a restriction against any proprietor of the ground for the time being carrying on the business of an innkeeper; and in *Mann* v. *Stephens* (4), the owner of a house and a piece of land conveyed the house, covenanting with the owner not to build on the land. The house became vested in X. and the land in Y., with notice of the covenant. Y. being about to build a beerhouse, a motion was made for an injunction, which was granted; these cases came before the Master of the Rolls in *Tulk* v. *Moxhay* (5) (the Leicester Square Case), and also before Lord Cottenham (6); see also Lord St. Leonards' Vendors and Purchasers (14th ed.), p. 804, App. 1; and in *Thornewell* v. *Jackson*, before Bacon, V.C., May 6, 1881, a judgment to the same effect was pronounced.

In the *Duke of Bedford's Case* (7) the party seeking to enforce the condition failed, because he had by his own acts placed the property under such different circumstances that there was no reciprocity. *Coles* v. *Sims* (8) decided that where the defender

(1) 5 Court Sess. Cas. 4th Series, 439.
(2) 8 Court Sess. Cas. 3rd Series, 1006.
(3) 9 Sim. 196.
(4) 15 Sim. 377.
(5) 11 Beav. 571.
(6) 2 Ph. 774; 1 Hall & Twells, 105.
(7) 2 My. & K. 552.
(8) Kay, 56; 23 L. J. (Ch.) 258.

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had notice of a covenant which contained a general scheme for the benefit of all the parties building, he was restrained from building in a contrary manner. In *Western* v. *Macdermott* (1) each of the original owners of the houses in a row entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house: held that whether the covenant ran with the land or not, a purchaser of one of the houses with notice of the covenants would be bound by them in equity.

In *Catt* v. *Tourle* (2) a brewer sold a piece of land to a land society, who covenanted that he his heirs and assigns should have exclusive right of supplying beer to any public-house erected on the land: held, that the Court could restrain the defender, who had notice of the covenant, from acting in contravention of it: see also *Luker* v. *Dennis* (3). In *German* v. *Chapman* (4) a restraint against using a dwelling-house as a school was enforced. Such conditions are also familiar in mining leases: *Bishop of St. Albans and Others* v. *Battersby* (5); and in America, *Cowell* v. *Colorado Spring Co.* (6)

As to interest. There are a series of rights running with the land which, though the superior may have parted with all his land, yet remain. If this were not so all building conditions would cease to be enforceable at the instance of the superior whenever he had feued out all his estate, which is not the case, see the *Magistrates of Edinburgh* v. *Macfarlane* (7).

Lord Corehouse in *Tailors of Aberdeen* v. *Coutts* (8), said, "one of the requisites to make conditions in feudal grants effectual is an interest on the part of the superior that they shall be enforced. This is illustrated by the case of *Campbell* v. *Harley* (9), and the objection seems in a more simple form in *Brown* v. *Burns* (10)."

The result of these authorities is, that where the object for

(1) Law Rep. 2 Ch. 72.
(2) Law Rep. 4 Ch. 654, at p. 657.
(3) 7 Ch. D. 227.
(4) Ibid. 271.
(5) 3 Q. B. D. 359.
(6) Otto's U. S. Rep. (Sup. Court) vol. x. 55.
(7) 20 Court Sess. Cas. 2nd Series, 156.
(8) 1 Rob. App. at p. 320.
(9) 1 Will. & S. App. 690.
(10) 2 Court Sess. Cas. 1st Series, 261.

which the condition was imposed can no longer be secured owing to the superior having permitted or acquiesced in a general departure from it on the part of other feuars, the superior will not be at liberty to enforce it arbitrarily against individual feuars. And this principle was also applied in *Campbell* v. *Clydesdale Banking Company* (1), where a number of feuars contravened, without objection on the part of the superior, restrictions as to the height of buildings in a street, and it was held that the superior had lost his rights to enforce the restrictions against a single feuar. Here the superior had done nothing to lose his interest. On the contrary he had a material interest of a patrimonial character. His mansion-house is within half a mile of the town. He was owner of houses in the town itself of the annual rental value of £750; and he has a large extent of ground in and adjoining the boundary of the town, which he intends to feu; and he believes that the value of these properties will be injuriously affected if the liquor trade is not placed under greater restrictions.

On the question of waiver, acquiescence, and prescription: it must be remembered that the condition here was not one of those which if once relaxed, must from its nature be held to have been relaxed for ever. And it could not be inferred that because the superior might give his consent in some cases, that he should do so without limitation as to time. The public-houses owned by Peter Carmichael and the MacArthurs are the only ones with respect to which the appellant's averments are such as to raise the plea of prescription. The appellant does not admit that prescription applies; but if the plea is to be insisted on some proof will be required.

The Lord Advocate (*J. B. Balfour*, Q.C.), and *Vary Campbell*, contended for the respondents:—

The condition which the appellant seeks to enforce here was not a real burden or obligation passing with the land against singular successors, and at any rate the appellant is not now in a position to put it in force against them. For (1.) No restriction of this nature on the free use or disposal of property can be enforced without an interest such as the law will recognise. (2.) It is

(1) 6 Court Sess. Cas. 3rd Series, 943.

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unlawful, as being contrary to the nature of property, as being against public policy, and as putting it into the power of the superior to secure the monopoly of a particular trade in Grangemouth. (3.) Any right which the appellant might have had to enforce the restriction has been lost non utendo during the prescriptive period. And further, by waiver and abandonment on the part of the appellant and his predecessors.

The Lord Ordinary said, that the interest necessary to entitle him to enforce the restriction in question must be an interest arising from the use of the special subject; that is a principle which runs through a long series of decisions. Earliest *Heriot Hospital* v. *Ferguson* (1); see Lord Deas in *Frame* v. *Cameron* (2). In *Tailors of Aberdeen* v. *Coutts* (3) the Scottish judges stated that "the burden or condition must not be contrary to law or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy, for example, by tending to impede the commerce of the land, or to create a monopoly. The superior, or the party in whose favour it is conceived, must have an interest to enforce it."

His interest must be similar to that required in the law of servitude, and no servitude can be enforced unless it be for the benefit of a dominant tenement. See Erskine, ii. 9, 33; Rankine on Land Ownership, p. 327, and Lord Deas in *Alexander* v. *Stobo* (4). It must be for the benefit of the superior's neighbouring estate, as to preserve the residential character of his feuing lots, or to prevent the vassal from erecting large and heavy buildings, where he has reserved the minerals: *Naismith* v. *Cairnduff* (5).

In *Brown* v. *Burns* (6) Lord Gillies said, "The clause introduced into the condition is a legal servitude, and every one who purchased did so under the burden of it. But then, when we are called on to enforce it, there are two principles we must keep in view, (1st.) The party opposing must shew a fair and legitimate interest to object. But these ladies (the superiors) have none.

(1) 2 March, 1774; Morr. 12817; aff. 3 Pat. App. 674.

(2) 3 Court Sess. Cas. 3rd Series, 290, at p. 293

(3) 1840; 1 Rob. App. 296, at p. 307.

(4) 9 Court Sess. Cas. 3rd Series, 599, at p. 612.

(5) 3 Court Sess. Cas. 4th Series, 863.

(6) 2 Court Sess. Cas. 1st Series, at p. 262.

All their grounds having been feued, so that the conversion into shops cannot injure their right of feuing; and (2nd) Even if the party has an interest, he cannot be permitted to act in emulationem vicini. In the present case, entire streets have been converted into shops, and yet these ladies resist the building of one in a particular corner. I think that they have no legitimate interest to do so." That case shewed that the mere tenure of the superior was not enough interest, and was followed and approved in *Tailors of Aberdeen* v. *Coutts* (1). See, also, *Campbell* v. *Harley* (2). They therefore submitted that the appellant had no interest as superior in enforcing this restriction; nor had he shewn any in his condescendence Nos. 10 and 11. The respondents' public-houses do no patrimonial damage to his estate, and the neighbourhood has, as in *Brown's Case* (3), lost any merely residential character which ever belonged to it, and has long been used for shops or public-houses. Moreover, it was repugnant to the rights of property. The management and disposal of property cannot be dependent on the will and pleasure of the superior, or of any one but the owner: *Governors of Heriot's Hospital* v. *Ferguson* (4). There the feu-right contained a clause forbidding the use of the subjects "in any other way than by the ordinary labour of the plough and spade, without the express consent and liberty of the Governors of the said hospital had and obtained thereto for that effect." It was held that a singular successor could not be prevented from building on the land. Also the clause is an infringement of the licensing statutes, and objectionable on the principles stated in *Tailors of Aberdeen* v. *Coutts* (5), and *Campbell* v. *Harley* (6), as tending to put in the power of the superior the monopoly of a lawful trade. *Ewing* v. *Campbell* (7) was a restriction against building anything but private dwelling-houses; and *Ewing* v. *Hastie* (8) was between feuars and not superior and vassal, and therefore did not apply. Neither did the case of *Houldsworth* (9). In a question of interest, the differ-

(1) 1 Rob. App. 296.
(2) 1 Will. & Shaw, 691, at pp. 695, 698.
(3) 2 Court Sess. Cas. 1st Series, 261.
(4) 2 March, 1774; Morr. 12817; Aff. 3 Pat. App. 674.
(5) 1 Rob. at p. 307.
(6) 1 Will. & Shaw, at p. 695.
(7) 5 Court Sess. Cas. 4th Series, 230
(8) Ibid. 439.
(9) 8 Court Sess. Cas. 3rd Series, 1006.

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ence between a 999 years lease and a feu was a great deal, but at least there the pursuer shewed some patrimonial interest, and was not barred by acquiescence.

The right now claimed has been extinguished non utendo for forty years. There has been not only non-user of the right, but the respondents have acted independent of it during the whole prescriptive period. This is sufficient to free a tenement burdened with an ordinary servitude: Erskine, Inst. 2, 9, 37.

In a case of relevancy the averments and admissions of the pursuer must be looked at, and nowhere in those here does the superior say that he has ever stopped the permission, therefore it must be taken that the restriction has never been enforced until the present proceedings; and where a person interested in maintaining these restrictions allows them to be disregarded, in many cases the Court will hold the restriction to be waived and abandoned: *Campbell* v. *Clydesdale Banking Company* (1); *Fraser* v. *Downie* (2).

The doctrine of English law is correctly summarised in Smith's L. C., 8th ed. p. 103: "Upon the whole there appears to be no authority which has decided, apart from the doctrine of notice, that the burden of a covenant will run with the land in any case except that of landlord and tenant." That was more stringent against perpetual burdens on land than the law of Scotland. The result of all the authorities in Scotch law—where law and equity is combined—is that the singular successor is in no case of feuing restrictions bound by notice from the titles unless the obligation sought to be imposed upon him are such as the law permits as real burdens, and such as can in existing circumstances be equitably enforced: see *Baird's Trustees* v. *Mitchell* (3), where a condition to pay damages which may be incurred held not to be a real burden.

[They also cited *Gordon* v. *Marjoribanks* (4); *Peek* v. *Matthews.* (5).]

Sir F. Herschell, S.G., was relieved from any reply on the

(1) 6 Court Sess. Cas. 3rd Series, 943.
(2) 4 Court Sess. Cas. 4th Series, 942.
(3) 8 Court Sess. Cass. 2nd Series, 464.
(4) 6 Dow. 87.
(5) Law Rep. 3 Eq. 515.

general question, and was asked to confine his remarks to the question of acquiescence and waiver.

If acquiescence or a waiver of this restriction can be culled from the record of the case, then it would be necessary to have the circumstances explained by the parties as a case of fact under which the trade was allowed to be carried on, unless the House considered there was sufficient admission on the record of waiver and acquiescence in each case, which he submitted there was not.

The Lords having taken time to consider, delivered judgment as follows:—

June 12. LORD SELBORNE, L.C.:—

My Lords, this is an appeal from interlocutors of the Court of Session, dismissing four conjoined actions brought by the Earl of Zetland as superior against several feuars on his Grangemouth estate, on the ground that the pursuer had not set forth any interest to sue the actions; the question in each case arising on relevancy, i.e., taking as true the averments and admissions of the pursuer on the record. The conclusion of the summons in each case was for an interdict to prohibit the defenders from selling or retailing any kind of malt or spirituous liquors, or allowing the same to be sold or retailed, within the buildings erected on their feus.

The Court of Session has dealt with all these actions as if the case stated on the record by the pursuer in each of them were substantially the same. This would be right, if Lord Young's ground of judgment could be maintained; for that learned judge considered that the restriction sought to be enforced by the pursuer was repugnant to the nature of the feuar's estate, and therefore invalid in law. The same may be said of another ground of judgment taken by Lord Craighill, who thought the restriction inconsistent with public policy. Neither, however, of those opinions was adopted by the Lord Justice Clerk, or by the Lord Ordinary, both of whom proceeded upon a different ground, viz., that the Court was asked by the pursuer to enforce the restriction, not for the protection of his own patrimonial interest, but in order to give effect to his views of the moral and social well-being of the community of Grangemouth.

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It will be convenient, in the first place, to consider whether the opinions of Lord Young and Lord Craighill are correct; and, if your Lordships should think otherwise, then whether it is consistent with the averments and admissions of the pursuer on the record to hold that he seeks to enforce the restriction, not for the protection of any property in which he is interested, but for other reasons.

The feus were granted by the appellant's predecessor in title, in the years 1801, 1811, 1814, and 1822 respectively; and in all of them the restriction was the same. [His Lordship then read it as given above.]

It was urged at the Bar that this was not a condition of the feu which could run with the land against a singular successor, but was only a personal agreement between the original parties to the feu contract. Nothing, however, can be more certain than that it was the intention of those parties to make it a condition of the feu, if by law they were able to do so; because it purports, on the one hand, to bind, not James Simpson and his heirs only, but his assignees, or any tenant or possessor of the houses to be erected on the feu; and, on the other hand, the power to enforce or dispense with it is given not to the disponer or his heirs, but to the superior for the time being. Unless, therefore, the condition was repugnant to the nature of the estate taken by the feuar, or to public policy, it must be a condition of the feu, and must run with the land against singular successors.

The view taken by Lord Young appears to have been that the dominium utile of land feued can only be affected by such burdens as are known and lawful servitudes, beneficial to some dominant tenement; and his Lordship, admitting that building conditions and restrictions among a community of feuars in a street or square would not be repugnant to the nature of a feu, regarded such conditions as examples of the servitude de non ædificando, and held that the restriction now in question was not analogous to a condition of that kind. I am unable to reconcile that opinion with the authorities which were cited by the appellant's counsel at your Lordships' Bar. In the case of the *Tailors of Aberdeen* v. *Coutts* (1), which was one of burgage or tenure considered to

(1) 1 Rob. App. Cas. at p. 324.

depend upon the same principles as a feu, the Court (in an opinion approved by this House) affirmed the legality of conditions not distinguishable, in my judgment, from that now in question. "There is," it was there said, "a prohibition to tan leather, to refine tallow, to make candles, to slaughter cattle, and various other nuisances, which, leaving out of view the circumstances of this particular case, are all of a nature to bind singular successors, without being declared in express terms to be real burdens or feued with irritancies, *because they are lawful conditions of the grant.*" It appears to me that the word "nuisances" in this passage does not mean things which are necessarily and in their own nature nuisances in law, but has reference to the manner in which the neighbourhood of businesses, such as are there mentioned, may affect the value and amenity of dwelling-houses, or property suitable for the erection of dwelling-houses, and the comfort of the persons residing therein; and in this respect I see no important distinction between such businesses and the trade of a publican selling by retail malt or spirituous liquors.

In *Ewing* v. *Campbell* (1) the Judges of the First Division appear to have entertained no doubt as to the validity of such a restriction against the trade of a publican, though, in that case the question whether it was binding on a singular successor did not arise. It was contended at your Lordships' Bar that such a restriction tends to a monopoly, and offends against public policy as being in restraint of trade. The Court, in *Ewing* v. *Campbell* (1), evidently did not think so, and if there were any foundation for that argument, it must be as valid in England as in Scotland, which would be contrary to many English authorities, and it would be fatal to the condition, whether it did or did not run with the land. If a restraint against carrying on such lawful businesses as those of a tanner, a blacksmith, or a schoolmaster is good in law, and capable of running with the land, and is not repugnant to the dominium utile vested in a feuar, I am unable to conceive any reason why it should be otherwise as to the business of a publican. The fact that restrictions are placed by statute law upon the freedom of that particular trade, and that it cannot be carried out without licenses from magistrates, constitutes,

(1) 5 Ct. Sess. Cas. 4th Series, 230.

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in my judgment, no reason why a private contract to prevent it from being carried on by a feuar on his feu without the consent of his superior, should be held invalid or contrary to law. So far from any such objections acquiring greater force from the power of dispensing with the restriction which the superior, in the case before your Lordships, has expressly reserved, I think the tendency of that power of relaxation is in the opposite direction.

It was, indeed, contended by the respondents' counsel that, although a prohibition of this kind might be valid, and bind singular successors, if it were absolute it could not do so here, because as to some trades, a power of judgment whether they are noisome, &c., or not, and, as to the particular trade in question, a power to dispense with the prohibition, is reserved to the superior, For this distinction no authority was cited; and it does not appear to me to be well founded in principle. In all cases of restrictive conditions in a feu charter (such, for example, as restrictions on building), the superior must have power to enforce them, or to dispense with them, according to his own will, whether the charter is so expressed or not, unless the benefit of them, and the right to enforce them, are communicated to other feuars. The recent case of *Hislop* v. *Leckie* (1) before your Lordships is an example of restrictions of that kind, which the superior only had a right to enforce. Your Lordships in that case dismissed the action of a neighbouring feuar, as having no interest; but I think you entertained no doubt that the condition was valid, and might have been enforced or dispensed with by the superior at his pleasure.

The proposition, that no conventional restrictions can be imposed upon the dominium utile of the feuar beyond those which are naturalia feudi, has (of course) not been maintained. Lord Young's view, that a restrictive condition, to bind a singular successor, must create some known or lawful servitude for the benefit of some dominant tenement, converts that into a rule which seems to me to be (at best) an imperfect analogy. Such prohibitions of particular trades as were held to be binding on singular successors in the case of the Tailors of Aberdeen are clearly not "servitudes" in the proper sense of that term; though

(1) 6 App. Cas. 560.

they may be like servitudes in two respects: first, because they are burdens upon the dominium utile; and, secondly, because the superior must have some patrimonial interest in order to enforce them. In these respects, the restriction now in question stands upon exactly the same ground. I can understand that there may be good reason for drawing a line between restrictions by which it is attempted to impose upon the feuar for the time being some personal obligation (as in *Campbell* v. *Harley* (1), and other Scotch authorities cited at the Bar), and those which relate to the use or employment of the land, or of buildings erected upon it, and for holding that the former cannot, while the latter may, run with the land against singular successors. This distinction would reconcile the decision upon the facts in the case of *Keppell* v. *Bailey* (2) (whatever may be thought of some parts of Lord Brougham's reasoning), with other English authorities, except *Catt* v. *Tourle* (3), as to which case the present is not a proper occasion for expressing any opinion. But, assuming the soundness of the distinction (and to me it appears to be sound in principle), the restriction in the case before your Lordships is not personal, but relates to the use and employment of buildings erected on the land.

I am for these reasons unable to agree with the opinions delivered by Lord Young and Lord Craighill in this case. It is, of course, a different question whether the pursuer in all or any of these cases, may be seeking to enforce the restriction under circumstances, or in a manner, which ought to deprive him of the assistance of the Court. But the original validity of the restriction must, in my opinion, depend upon the law applicable to it at the date of the feu contract, and not upon any subsequent events.

The next question is, whether there is any sufficient ground on these records for holding (with the Lord Ordinary and the Lord Justice Clerk) that the interest to sue the actions set forth by the pursuer is unconnected with his patrimonial rights, and relevant only to the general well-being (as he regards it) of the community of Grangemouth. That question must be determined,

(1) 1 Will. & Sh. 690. (2) 2 Myl. & K. 517.
(3) Law Rep. 4 Ch. 654.

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for the purposes of the present appeal, upon the averments and admissions of the pursuer on the record, and upon those materials only. It appears, from those averments and admissions, that the whole of the town of Grangemouth, now containing a population of more than 5000 inhabitants, with large shipping, and other trade, is built on the pursuer's estate; that there are now in Grangemouth fourteen houses and shops licensed by the magistrates for the sale of malt or spirituous liquors, consisting of two hotels, seven dram shops, four grocers' shops, and a restaurant; that many feu rights granted by the pursuer and his predecessors in title during the last thirty years contain no prohibition against the obtaining of grocers' licenses, but that the prohibition against dram shops has been contained in all the feu right granted by them; that certain coppersmiths' and blacksmiths' shops, eating-houses, and victualling houses, have for many years existed in the town with the consent of the pursuer and his predecessors in title, and that certain public-houses have also existed for different periods prior to Whit Sunday 1880, with their knowledge; that the pursuer is now endeavouring to enforce the prohibition in question against all the dram shops in Grangemouth, but that he is not interfering with the four licensed grocers' shops, and that he does not propose to interfere with the two hotels, or the restaurant, provided they are conducted in an unobjectionable manner. These are admissions made by the answers for the pursuer to the statement of facts for the defender, and I find nothing else in those answers which appears to me to be material to the question now under consideration.

In his own condescendence the pursuer states the interest in respect of which he sues, in the following manner: the first sets out the material terms of the feu disposition, his own title, and the titles of the several defenders, the fact that the buildings on the feus are used as public-houses for the sale of malt and spirituous liquors, a notice given by him in January, 1880, of his intention to put the prohibition in force on and after the 15th of May, 1880; and the continuance of the sale of malt and spirituous liquors upon the premises notwithstanding such notice. He then in the 10th and 11th articles of the condescendence concludes as follows: "10. The town of Grangemouth was commenced about

a century ago by the pursuer's ancestor, Sir Lawrence Dundas, who built a number of dwelling-houses in what is now the heart of the town. These houses, which yield an annual rental of about £750, now belong to the pursuer. The whole of the rest of the town is built on ground held of the pursuer as superior, and he still has a large extent of ground in and adjacent to the town available for feuing, including upwards of 140 acres within the borough boundaries. The pursuer's mansion-house of Kerse is also within half a mile of the town, and his policy grounds extend considerably nearer to it. 11. The existence of so many public-houses as there at present are in Grangemouth, including the premises embraced in the summons, and the prevalence of drunkenness thence arising, are detrimental to the value of the pursuer's property above referred to, and seriously interfere with the comfort and well-being of many of his tenants and feuars, besides being prejudicial to the comfort and amenity of his mansion-house and policies."

I am unable to find upon the record any statement by the pursuer that he is suing to enforce any views which he may entertain as to the moral or social well-being of the community of Grangemouth as distinct from the protection of his own patrimonial interest. He has stated upon the record a clear patrimonial interest in the following subjects: (*a*) his right of superiority in each and every one of the parcels of land feued by him, by virtue of which in certain contingencies the dominium utile in the premises feued might revert to him, which interest alone would be enough to justify him in seeking to maintain unimpaired the value of the houses erected on all such premises; (*b*) the houses in the centre of the town, yielding him a rent of about £750 a year; (*c*) his building ground, available for feuing, within the borough boundaries, being in extent more than 140 acres; and (*d*) the mansion-house and policy grounds of Kerse, within the distance of half a mile of the town. As to all this property he alleges generally that its value is prejudicially affected by the existence of the present number of public-houses in Grangemouth, including the particular premises embraced in the summons, and by the prevalence of drunkenness thence arising; and that the same causes seriously interfere, not only with the comfort and well-being of many of his tenants and feuars, but with the comfort and

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amenity of his own mansion-house and policies. I cannot myself doubt that this is an allegation sufficiently clear and distinct of injury to the pursuer's patrimonial interest. The word "well being," used as to his tenants and feuars, may indeed be susceptible of a wider sense, but it cannot prevent the other words with which it is associated from receiving their natural construction.

It was contended at the Bar that the allegation did not sufficiently connect the particular trade carried on upon the premises mentioned in the summons with the alleged injury, but I am not of that opinion. The object of a restriction against carrying on a trade of this nature without license from the superior is that the superior may judge for himself what number of public-houses, and in what part of the town, may be permitted by him without prejudice to the value and amenity of his other property. When he finds the condition violated in such a number of cases as to result in some detriment to the value or the amenity of his property, he is, in my opinion, entitled, without attempting to apportion the precise amount of damage due to each particular public-house, to enforce the prohibition against such houses as he does not think fit to license; unless indeed by some conduct or acquiescence of his own he is estopped from doing so.

There are other defences besides want of interest pleaded in all the actions, which not being, in my judgment, established by the averments or admissions of the pursuer on the record, cannot at present be disposed of, but on which the parties must proceed to proof. On the record as it now stands the case, as between the pursuer and the defenders, appears to be the same in all the actions as to all but one of the defences so pleaded; but as to one of them, that of consent and acquiescence, the cases of the several defenders are distinct; and, if it were proper, in hoc statu, to dispose of them, I might myself be led to different conclusions in at least the cases of Webster and Rankin, and Macarthur and Storie, from those which I should adopt in Hislop's case. But as the pursuer has made a case upon his own pleading against all the defenders, which, if not displaced by them, is sufficient to entitle him to the relief which he prays, and as I understand it to be the opinion of your Lordships that he is not so concluded by his answers to the statements of any of the defenders as to exclude

the possibility of his being able hereafter to repel the pleas of consent or acquiescence (as well as the other pleas), I am content that the judgment to be now pronounced should be in accordance with that opinion; and I assent to it the more readily because the actions have been hitherto conjoined, and it does not appear that the judgment of the Court of Session has been addressed to any other question than that of the pursuer's interest in a sense foreign to this particular question of consent or acquiescence.

The result is that I am prepared to move your Lordships to reverse the interlocutors appealed from in all these cases and to remit them to the Court below, to proceed therein as may be just; with expenses to the pursuer in the Court below from the date of the Lord Ordinary's interlocutor appealed against, all other questions being reserved for the disposal of the Court below. The Appellant must have the costs of this appeal.

LORD BLACKBURN:—

My Lords, I had at the close of the argument come to the conclusion that the interlocutors appealed against in these causes ought to be reversed, and the cause remitted, with directions to proceed therein as might be just. Further investigation and consideration have confirmed me in that opinion. I have had the advantage of perusing the opinions of the Lord Chancellor, and my noble friend opposite, Lord Watson; and finding that the reasons which have led me to that conclusion are fully and clearly stated in them, I do not repeat them.

I do not think that this House ought to decide now whether the fact admitted on the pleadings, that one of these defenders had used her feu for this purpose for more than forty years, would alone, if unqualified, entitle her to a decree in her favour. The Court below have not decided anything on that ground. It is enough to say that though use under some circumstances might prove acquiescence such as to be a defence, it might on these pleadings be shewn to be under such circumstances as not to do so.

LORD WATSON:—

My Lords, these four cases have been decided upon relevancy by the Courts below. In all of them Lord Zetland, the pursuer

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and appellant, has stated substantially the same grounds of action; and if these were, as the judgments under appeal determine, insufficient in law to entitle him to a decree, it would be unnecessary to consider separately the defences stated for the several respondents. Being of opinion, with your Lordships, that these judgments are erroneous, I shall confine my observations, in the first instance, to the case of *Lord Zetland* v. *Hislop*, which sufficiently raises the common question as to the relevancy of the averments made by the Appellant. [His Lordship then stated the conditions of Hislop's feu, and continued:]

From the tenor of these conditions I think it must necessarily be inferred that both the parties to the feu disposition had in contemplation the future growth of the town of Grangemouth, and that the conditions were framed, not merely with regard to the then existing state of things, but also with reference to the altered state of circumstances which the increase of the town and its population would naturally occasion. The inference is equally obvious that so far as concerned the condition prohibiting the sale of liquor, it was not intended to create any mutuality of interest or of right as between Simpson and his successors and the other feuars in the town. The qualification attached to the prohibition, making it removeable in the option of the superior, is inconsistent with the idea of any such mutual right. [His Lordship recited the facts of Hislop's feu, the appellant's 10th and 11th condescensions and the respondents' statements, as given above.]

The Lord Ordinary (Rutherford Clark) upon the 4th of November, 1880, found that the appellant had not "set forth any interest to sue this action," and in respect of that finding dismissed the action with expenses. On a reclaiming note to the Second Division both parties were allowed to amend their pleadings; and thereafter, upon the 18th of March 1881, their Lordships adhered simpliciter to the interlocutor of the Lord Ordinary.

The record, when the case was before the Lord Ordinary, did not, as I understand, contain the allegations of detriment to the value of the appellant's property which I have already cited. These were made for the first time in the Inner House; and it appears from the note appended to his Lordship's judgment that he decided against the appellant, in respect of the absence of any

averment of patrimonial interest to enforce the condition of the feu disposition.

I agree with the Lord Ordinary in thinking that the case of the *Tailors of Aberdeen* v. *Coutts* (1) does determine that wherever a feu right contains a restriction on property, the superior, or the party in whose favour it is conceived, cannot enforce it unless he has some legitimate interest. But that case does not lay down the doctrine that an action at the superior's instance, which merely sets forth the condition of his feu right and its violation by his vassal, must be dismissed as irrelevant because the pursuer has failed to allege interest. Primâ facie, the vassal in consenting to be bound by the restriction, concedes the interest of the superior; and, therefore, it appears to me that the onus is upon the vassal who is pleading a release from his contract to allege and prove that, owing to some change of circumstances, any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist. The law was so stated, and in my opinion correctly stated, by Lord Neaves in the case of *Campbell* v. *Clydesdale Banking Company* (2).

Although the interlocutor of the Lord Ordinary was in terms adopted by the Judges of the Second Division, it does not very accurately indicate the various legal grounds upon which their Lordships proceeded in giving judgment. Lord Young held that the condition sought to be enforced is, in its nature, repugnant to the right of property conferred upon the vassal by the disposition of feu; and Lord Craighill, though of opinion that the appellant had shewn no interest entitling him to enforce it, was prepared to hold, if that had been necessary, that the condition "was void as being a restriction upon trade, and also as being inconsistent with public policy."

If Lord Young is right in the view which he takes of the character of the clause in question, no amount of patrimonial interest in the superior would make it enforceable at his instance against a singular successor like the respondent; and, on the other hand, if Lord Craighill has rightly estimated its character, the clause is a mere nullity and could not have been enforced as a personal obligation against the original vassal. Having regard

(1) 1 Rob. App. Cas. 296. (2) 6 Court Sess. Cas. 3rd Series, 943.

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to the opinions expressed by these learned Judges who constituted the majority of the Court below, I think it will be expedient to consider in the first instance whether, suâ naturâ, the condition is one which may be lawfully imposed upon his vassals by a superior having a legitimate interest in its observance.

It has long been a settled point in the law of Scotland that a condition may be inserted in a feudal grant, so as to run with the lands, although it is neither declared a real burden, nor protected by an irritancy. Professor Bell (Principles, sect. 861) says, "The peculiarity of the feudal contract admits of another principle, viz., the force of a condition as entitling the superior to refuse a renewal of the feu if the conditions stipulated in his contract with the vassal have not been observed, and to insist on such conditions against singular successors as well as against heirs."

The same principle extends to obligations undertaken by the superior, and is strongly illustrated by the decision of this House in the *Braco Case* (*Stewart* v. *Duke of Montrose* (1),) and in the recent case of *Dunbar* v. *British Fisheries Company* (2), in both of which an obligation to relieve the vassal of certain permanent annual charges upon the dominium utile was held to be binding, not only upon the original grantor of the feu, but upon all his successors in the estate of superiority. In the second branch of the *Braco Case* (*M'Callum* v. *Stewart*), which is only to be found in the Court of Session Reports (3), it was held by the House, affirming the decision of a large majority of the judges of the Court of Session, that the words of an original charter, which imposed an obligation of relief upon the grantor and his heirs and successors, merely imported that the superior for the time being, whether an heir or a singular successor, was to be liable, and were incapable of creating any personal obligation against the grantor or his representatives, if they ceased to be superiors. It is the privity of estate subsisting between the superior and vassal which enables them so to contract that their stipulations, if these be such as the law permits to run with the estate, will be binding upon the superior and his successors in the superiority, or upon the vassal and his successors in the feu.

(1) 4 Macq. 499.
(2) 3 App. Cas. 1298.
(3) 8 Court Sess. Cas. 3rd Series (H.L.) 1.

In the present case, the language used in the feu disposition of September, 1814, is such as will make the second condition binding upon the feuar for the time being, whether he be the heir or the singular successor of the original vassal, if that condition is in itself unobjectionable. I accept the doctrine stated by the Scottish judges, in answer to a remit from this House, in *The Tailors of Aberdeen* v. *Coutts* (1), to the effect that such feuing condition "must not be contrary to law or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy; for example, by tending to impede the commerce of land or to create a monopoly."

Is, then, the condition that two dwelling-houses erected upon a piece of ground feued for that purpose shall not be used for the sale or retail of malt and spirituous liquors, contrary to law, or inconsistent with the feuar's right of property? Lord Young has answered that question in the affirmative; but I know of no authority in the law of Scotland, and none was cited at the Bar, by which the view expressed by his Lordship can be supported. It was, indeed, maintained on behalf of the respondents that the only conditions of an urban feu which have been recognised as valid by the decisions of the Scottish Courts were such as related, mainly, if not entirely, to the structural character of the buildings on the feu, and not merely to their use.

There is, however, a consistent series of decisions, commencing with the *Case of Lauder* in 1815 (2) and ending with *Ewing* v. *Campbell* (3) and *Ewing* v. *Hastie* (4), in 1877, which not only confute that argument but seem to me to establish that restrictions similar to, if not the very same with, that which the appellant is seeking to enforce, are lawful, and may be made to run with the feu. These decisions refer to a great variety of restrictions, including nearly all of those which are expressed in the second condition of the original feu disposition in favour of James Simpson; and in not one of them was the intrinsic validity of the restriction made matter of dispute.

(1) 1 Rob. App. Cas. 296.

(2) June 16, 1815, Fac. Col. vol. 18, p. 450.

(3) 5 Court Sess. Cas. 4th Series, 230.

(4) 5 Court Sess. Cas. 4th Series, 439.

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It is unnecessary to refer in detail to these authorities, which are well known to every Scotch lawyer; and I only notice *Gold* v. *Houldsworth* (1) and *Ewing* v. *Campbell* (2), because doubts were suggested as to their value as precedents by one of the learned Judges in the Court below. The case of *Gold* v. *Houldsworth* (1) comes very near to the present. In a lease, granted in the year 1815, for the term of 999 years, and therefore equivalent to an alienation in perpetuity, the lessee and his heirs, assigns, and successors were prohibited, under certain penalties, from keeping a public-house or selling liquor, without the license in writing of the lessor for the time being. The First Division of the Court, in the year 1870, gave effect to the prohibition, the defence relied on by the tenant being that he was entitled to disregard the prohibition on payment of the penalty attached to its violation. The Lord President (Inglis), who delivered the unanimous judgment of the Court, said, "It is a lease for 999 years, and therefore in so far as the interests of the parties are concerned it resembles a contract of feu. I look upon it in the same light as if it were a feu contract between Sir James Stewart Denholm and the predecessor of Mr. Gold in 1815."

Lord Craighill, however, holds that the case of Gold is inapplicable, because there is no analogy between the position of a feuar and that of a lessee. That may be his Lordship's view, but it will not explain away the fact that the First Division based their decision upon the assumption that the lessee for 999 years was not an ordinary tenant, and that his rights and obligations, so far as concerned the prohibition in dispute, were precisely the same as if he had held under a contract of feu.

In *Ewing* v. *Campbell* (2), which was the case of a proper contract of feu, the prohibition founded on by the superior was against the use of the dwelling-house, which the feuar was bound to erect, as a public-house. The feuar proposed to use it as a hydropathic establishment, and the only question raised was whether such an institution fell within the language of the prohibition. There was, as Lord Craighill correctly states, no controversy as to the enforceability of the condition; but he adds, "the reason being

(1) 8 Court Sess. Cas. 3rd Series, 1006.

(2) 5 Court Sess. Cas. 4th Series, 230.

that the estate from which the ground feued was given off was an entailed estate; that the ground was feued in virtue of 31 & 32 Vict. c. 84, under the conditions approved of by the sheriff; that the clause in question expressed a condition approved of by the sheriff; and consequently that the condition there came to be of statutory authority." No doubt the estate of the superior in that case was under entail fetters, and the feu charter was therefore adjusted by the sheriff in terms of the statute; but I feel assured that the inference which the learned Judge derives from that circumstance never occurred to the Court, or to the counsel for the feuar, of whom I happened to be one; and I cannot conceive how the condition, if it were void at common law, could be validated by the sheriff's approval, seeing that the statute gives no authority for the introduction of other than lawful feuing restrictions.

The true explanation of the fact that there was no controversy as to the legality of the restrictions enforced in *Gold* v. *Houldsworth* (1), or in *Ewing* v. *Campbell* (2), or indeed in any one of the series of decisions to which I have referred, I believe to be this; that neither the Bar nor the Bench entertained the slightest doubt that these restrictions were lawful conditions of a contract of feu, affecting the tenure of every vassal, whether heir or singular successor; and that the legality of such conditions has been judicially impeached for the first time in the causes which your Lordships are now considering.

It is hardly necessary to notice the argument by which the respondents endeavoured to establish that the prohibition in question tends to create a monopoly of the sale of liquor in Grangemouth, and is therefore void on considerations of public policy. It appeared to me to involve the fallacious assumption that the statutory function of the licensing authorities is to establish public houses; whereas all that is committed to them by statute is to determine whether persons who are otherwise at liberty to sell liquor upon their premises, shall have license to do so, having regard to the character of the premises and the possible requirements of the locality. If such a prohibition were in itself contrary

(1) 8 Court Sess. Cas. 3rd Series, 1006.

(2) 5 Court Sess. Cas. 4th Series, 230.

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to public policy it would be quite as objectionable in an ordinary lease of buildings, capable of being used for the sale of liquor, as in a contract of feu; and yet the respondents' counsel did not dispute that every proprietor in Grangemouth might let his house subject to the prohibition; and that Lord Zetland himself, had he been fee simple proprietor of the whole burgh, might have lawfully introduced it into the lease of every tenement in the burgh.

The question, therefore, comes to be whether the appellant has set forth on record any legitimate interest to enforce the prohibition. The appellant, assuming an onus which was not necessarily incumbent on him, has made an explicit statement of the facts and circumstances upon which he relies as giving him that interest; and if that statement were plainly irrelevant, I apprehend that your Lordships would have no difficulty in holding that the action ought to be dismissed. But, in my humble opinion, the averments of the appellant, which, in a question of relevancy, must be taken as true, disclose a very plain case of patrimonial interest. I am at a loss to understand how some of the judges in the Court below, in the face of his very specific allegations of detriment to the value of his house property and of his land, both feued and unfeued, as well as to the comfort and amenity of his mansion-house and policies, have been able to arrive at the conclusion that the object of the appellant in these actions is, not to protect any property right, but to promote the social and moral well-being of the community.

From the views expressed by his two colleagues in regard to the intrinsic illegality of the condition, the Lord Justice Clerk strongly dissents; and I do not understand that His Lordship would have doubted the appellant's interest and right to enforce it, had matters remained as they were in the year 1814. His Lordship seems, however, to hold that the superior's right to maintain conditions which may benefit his property but are also calculated to affect the social or moral well-being of the people, is incompatible with the powers of management conferred on burgh commissioners by the General Police Act, and consequently that the right and interest of the appellant to prohibit public-houses have disappeared, now that Grangemouth has 5000 inhabitants and a municipal government of its own. I entertain no doubt

that a feuing condition may become, through a change of circumstances, inapplicable, and therefore inoperative; and an increase of population may be an element in estimating such change. If all the dwelling-houses, save one, in a particular street were by license of the superior used for the sale of liquor, I can conceive that the superior might have difficulty in shewing a legitimate interest to prohibit the sale of liquor in that one house. But I am at a loss to understand why the existence of a whole street of public-houses in one part of the burgh should disable him from enforcing the prohibition in a street of villa dwellings in another quarter of the town. To adopt the view of the Lord Justice Clerk would be tantamount to holding that no such condition can be valid when the subject of the feu is situated within the limits of a police burgh with a population of 5000 or more; at all events the logical result of His Lordship's opinion is, that the prohibition against public-houses has become a dead letter in the case of every feu within the police boundaries of Grangemouth, no matter what may be the character of the buildings erected upon it, or of the locality in which it is situate.

The learned counsel for the respondents, in arguing that the prohibition, assuming it to be neither inconsistent with the feuar's right of property nor at variance with public policy, is no longer enforceable by reason of an admitted change of circumstances, relied mainly upon the authority of *Brown* v. *Burns* (1) and of *Campbell* v. *Clydesdale Banking Company* (2). In both of these cases the superior had imposed upon all the feuars in a particular street a prohibition, in the one instance, against using their houses as shops, and in the other against erecting buildings other than tenements of a certain elevation and design. The prohibition was absolute in both cases, and in one of them the superior had undertaken to his vassals to insert it in all their feu rights; the obvious intention of the superior in imposing, and of the vassal in submitting to the restriction, being to secure uniformity in the architecture of the buildings, or in the character of their occupancy. The superior in *Brown* v. *Burns* (1) admitted that all the houses in the street had, without objection on his part, been converted into shops; and in *Campbell* v. *Clydesdale Banking Company* (2) it was

(1) 2 Court Sess. Cas. 1st Series, 261. (2) 6 Court Sess. Cas. 3rd Series, 943.

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admitted that the superior had allowed a number of feuars in the street to depart from the common restriction. In these circumstances the Court held that the superior, who had thus disabled himself from challenging the acts of those feuars who had already disregarded the restriction, was not in a position to enforce it against his other feuars. Any other decision would, in my opinion, have been unjust and contrary to the good faith of the contract, because, in consequence of the inaction of the superior himself, the object which the contracting parties contemplated in creating the prohibition could no longer be attained by enforcing it against each or all of the feuars by whom it had not been violated.

But these decisions have no possible bearing upon the facts alleged or admitted in the present case. In the feu rights given by Lord Zetland it is not stipulated or contemplated that no feu shall be used for the purposes of a public-house or for the sale of liquor.. The plain intention of the contracting parties, as expressed in these feu rights, is that the superior shall determine whether there are to be public-houses upon any of the feus, and if so what is to be their number and position. Accordingly the superior, in granting his license to certain feuars to sell liquor, is in no sense departing from or waiving the prohibition, as was the case in *Brown* v. *Burns* (1) and *Campbell* v. *Clydesdale Banking Company* (2); he is acting in exercise of the discretionary power conferred upon him by the feu rights.

I accordingly agree with your Lordships that in *Zetland* v. *Hislop* the interlocutor under appeal must be reversed, and the cause remitted to the Court below. In the other three actions the same result must follow, so far as regards the interlocutors under appeal; but in these cases a question arises, whether the respondents are not entitled to have the pleas of acquiescence stated by them sustained, and on that ground to have judgment of absolvitor. It appears to me that these respondents have, in their defence, averred facts and circumstances from which, if proved or admitted, it might be matter of legal inference that successive superiors have so acquiesced in the feuar's use of their premises for the sale of liquor that the prohibition must be held to have been unconditionally discharged.

(1) 2 Court Sess. Cas. 1st Series, 261. (2) 6 Court Sess. Cas. 3rd Series, 943.

But the respondents are not entitled to a judgment in their favour, upon the record, unless the appellant has given an unqualified admission of averments sufficient to infer discharge of the prohibition; and it is not enough, in my opinion, that the admitted facts would, taken per se, sustain the inference, if the record leaves it open to the appellant to adduce proof which may give a different colour to these facts. Upon a careful consideration of the records I have come to the conclusion that it is open to the appellant to prove such qualifications of the facts which he has admitted as may entirely alter their complexion, and whatever my own views may be as to the probabilities of the appellant having available evidence at his command, I do not feel justified in refusing him the opportunity of adducing such proof as he may have to offer.

In the *Earl of Zetland* v. *Webster and Rankin* the respondents allege that, shortly after the feu was given off in 1811, a building was erected, "and premises therein used and occupied as a public-house for a considerable number of years immediately subsequent to 1812, without objection on the part of the superior. After an interval of some years, they were again licensed and have been occupied as a public-house for the last thirty years." The appellant, in answer, admits that part of the dwelling-house erected on the feu "has been occupied for a public-house for about thirty years," and quoad ultra denies the respondents' allegations. Again, the appellant meets with a simple denial the respondents' further allegation, to the effect that "the pursuer and his predecessor have acquiesced in the occupation of the defender's subjects as a public-house for forty years and upwards, and it was with their consent as superiors that such use and occupation originally began." All that the appellant admits is the bare fact of use as a public-house for thirty years. He denies consent, and he denies acquiescence. No doubt his denials are made in general terms, but they are not more general than the respondent's averments; and, as no complaint has been made of want of specification on either side, I entertain no doubt that, according to the practice of the Scotch Courts, it would be quite competent for the appellant to prove that the respondents had annually obtained the license of the superior, I do not mean to suggest that the appellant will

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be able to adduce any such proof; but I neither know what evidence he may have, nor am able to judge what its possible effect may be when taken in conjunction with the facts which he has admitted. I am, therefore, of opinion that the respondents' plea of acquiescence ought not to be disposed of until the facts of the case have been ascertained in the usual way.

I do not think it necessary to criticise in detail the records in *The Earl of Zetland* v. *Carmichael* and *The Earl of Zetland* v. *McArthur*, because, in both of them, the pleadings of the parties appear to me to be in substantially the same position, the appellant, in his answers, having laid sufficient foundation to entitle him to put in evidence facts and circumstances tending to shew that, notwithstanding the long continued use of the respondents' premises for the sale and consumption of exciseable liquors, the superior did not, either expressly or by implication, consent to the absolute discharge of the prohibition.

I am, therefore, of opinion that in all these appeals the interlocutor of the Court below ought to be reversed and judgment given in the terms proposed by the noble and learned Lord on the woolsack.

Interlocutors appealed from reversed; causes remitted to the Court below to proceed therein as may be just, with expenses to the pursuer in the Court below from the date of the Lord ordinary's interlocutors respectively appealed against; all other questions being reserved for the disposal of the Court below; the appellant to have the costs of the present appeal.

Lords' Journal, 12th June, 1882.

Agent for appellant: *W. A. Loch.*
Agent for respondents: *Andrew Beveridge.*

[PRIVY COUNCIL.]

ROSS AND OTHERS . . . . . PETITIONERS;

AND

THE CHARITY COMMISSIONERS . . RESPONDENTS.

J. C.*
1882
July 7.

In re THE CHARITIES OF ST. DUNSTAN-IN-THE-EAST.

Endowed Schools Act, 1869, *ss.* 5, 11, 14, *sub-s.* 1; *s.* 19, *sub-s.* 2—*Original Gift of Endowments—Appropriation of Charitable Endowments to Educational Purposes by Order of Court—Due Regard to Educational Interests.*

Endowments originally given for charitable uses but made applicable to the purposes of education by a scheme and an order of the Court of Chancery are educational endowments within the meaning of the Endowed Schools Act, 1869, s. 5.

Where such endowments were actually given more than fifty years before the passing of the Act, *held* that such subsequent appropriation of them as aforesaid cannot be deemed to be an original gift thereof within the meaning of sect. 14, sub-sect. 1, or of sect. 19, sub-sect. 2, so as to require the assent of their governing body to any scheme or provision made by the Charity Commissioners relating thereto.

Where the scheme of the Charity Commissioners increased the amount of tuition fees previously payable by a certain class of boys and added the condition that the trustees shall be satisfied that aid is needed by their parents, *held* that such provision does not fail in due regard to their educational interests within the meaning of sect. 11 of the Act of 1869, and sect. 5 of the Amendment Act of 1873.

THIS was a petition against a scheme made under the Endowed Schools Acts for the administration of the charities in the parish of St. Dunstan-in-the-East, in the city of London, hitherto regulated by a scheme of the Court of Chancery established by an order of the Court dated the 15th of June, 1867, in a suit entitled *Attorney-General* v. *Bartlett*. The petitioners were the surviving trustees under the Chancery scheme, who objected on the ground that the charities dealt with were not an educational endowment within the meaning of the Acts, and on other grounds appearing in the judgment of their Lordships, and prayed by their petition for a declaration that the charities were not liable to be dealt

* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR JOHN MELLOR.

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with under those Acts by any scheme of the respondents, and that the scheme under appeal might not be confirmed or ordered to be carried into effect.

Charles, Q.C., *E. Cooper Willis*, Q.C., and *F. Cooper Willis*, for the petitioners.

Horace Davey, Q.C., and *F. Vaughan Hawkins*, for the respondents.

The judgment of their Lordships was delivered by

Sir Montague E. Smith:—

This is a petition of the rector of the parish of St. Dunstan-in-the-East, the churchwardens, and certain other persons, trustees of property belonging to the parish administered under a scheme of the Court of Chancery, made on the 15th of June 1867.

It appears that in the parish of St. Dunstan-in-the-East there are several charitable endowments given by various donors and at various periods in the history of the parish. The property so given was held for charitable purposes, but none of the uses were for educational purposes, except as regards a small annuity of £10 which was given by Sir John Moore.

In the year 1852 an information at the relation of the Attorney-General was filed against the churchwardens for an account of the charities, and for a scheme for their due administration. The suit was delayed for a considerable time; but ultimately, on the 15th of June 1867, a scheme was settled, and approved by an order of the Court. No decisive action had been taken to carry its objects into execution before the passing of the Endowed Schools Act, 1869. The scheme of the Court of Chancery provided for the appropriation of a large part of the charitable income to the purposes of education. The 25th section of it prescribes the manner in which the property shall be dealt with. It is as follows:—"The trustees shall, subject to the provisions of this scheme, apply the income arising from the charities in the following manner, that is to say"—then follows a detailed description of the payments to be made for the benefit of the church and parish, other than for educational purposes, viz.:—

"To the rector, £210; the afternoon lecturer, to cease as after mentioned, £84; other officers and servants of the church and parish, to be reduced as hereinafter mentioned, £329; other expenses of divine worship, about £160 9*s.* 10*d.*; repairs (not exceeding), or such larger sum as Charity Commissioners approve, £200; to be laid by every year for structural repairs for the first five years and then to be reduced to £100 a year, to be so laid by, £200; management (not exceeding), £120; subscription to Tower Ward schools, £50; present gifts and subsequent annuities to the poor (to be increased as hereinafter mentioned to £400), about £280; gifts to the prisons, about £35;" (the total of those payments amounts to £1668). The clause then provides, "and the entire surplus in the support and maintenance of the schools hereinafter mentioned."

The scheme provides for the school, and the manner in which it shall be established, by the clauses commencing with clause 35:—"The trustees shall be at liberty to apply the moneys hereinafter authorized to be raised and accumulated, and the surplus income of the charities, after providing for the specific payments by this scheme provided, in the purchase of a site and the erection thereon of a school premises suitable for a middle-class day school, to be called St. Dunstan's College, capable of accommodating 400 boys." The following clauses are material to the questions raised on the appeal. Clause 47 provides "that there shall be four masters of the school. The head and second masters shall be graduates of one of the English Universities, or of Trinity College, Dublin; and all the four masters shall be members of the Church of England, and competent to give instruction in the various branches of education hereinafter mentioned." Section 44 contains the following provision:—"The instruction to be afforded in the school shall include the principles of the Christian religion, according to the doctrine of the Church of England." The 45th provides:—"Such number of day scholars shall be admitted by the trustees to receive instruction at the school as can be properly accommodated, and each day scholar whose parent, or person standing to him in loco parentis, shall reside or have his or her place of business or employment in the parish of St. Dunstan-in-the-East, shall pay to the trustees such sum, not exceeding £2

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per annum, and all other boys shall pay to the trustees such sum, not exceeding £8 per annum, as the trustee shall direct." Then provision is made in clause 56 for the foundation of scholarships, and in clause 57 of exhibitions.

This scheme not having been carried into execution, and the Attorney-General being of opinion that the part of the property which had been appropriated by it to educational uses fell within the provisions of the Endowed Schools Act, 1869, the Charity Commissioners were applied to, and in due course the scheme was prepared by them which is the subject of the present petition.

The scheme of the Commissioners altered and modified in various respects the scheme approved by the Court of Chancery, but it is unnecessary to go at length into its provisions. It will be sufficient to refer to such of them as are made material by the objections which have been urged at their Lordships' Bar.

The first objection to the scheme is one of considerable importance. It is that the scheme has no validity at all, and is not authorized by the Endowed Schools Act, inasmuch as it has been made without the consent of the old governing body. The objection, as originally submitted to their Lordships by Mr. Charles, was that the endowment was not an educational endowment within the meaning of the Act; but after a short discussion during the argument Mr. Charles gave up that point; indeed, it was impossible to maintain it, because these endowments distinctly fall within the definition of "educational endowments" given in the 5th section of the Act:—"In this Act, unless the context otherwise requires, the term 'educational endowment' means an endowment or any part of an endowment which, or the income whereof, has been made applicable or is applied for the purposes of education at school of boys and girls, or either of them, or of exhibitions tenable at a school or an university or elsewhere, whether the same has been made so applicable by the original instrument of foundation or by any subsequent Act of Parliament, letters patent, decree, scheme, order, instrument, or other authority." It is plain that this is an educational endowment falling within the second branch of this interpretation of the words. The endowment has been made applicable to the purposes of education by a scheme and an order of the Court of Chancery. The objection ultimately relied

on was rested on the 14th section of the Act, sub-sect. 1:—"Nothing in this Act shall authorize the making of any scheme interfering (1) with any endowment or part of an endowment (as the case may be) originally given to charitable uses, or to such uses as are referred to in this Act, less than fifty years before the commencement of this Act, unless the governing body of such endowment assent to the scheme." The governing body has not assented to this scheme, but dissents and petitions against it. The contention is that this property having been appropriated to educational uses by the scheme of the Court of Chancery within the last fifty years, it cannot be dealt with without the consent of the governing body appointed under that scheme; but, on looking at the words of the Act, it is plain that the sub-section refers only to the original foundation of a charity within that period. The words are:—"Endowment originally given to charitable uses, or to such uses as are referred to in this Act." Now, none of the properties in this case were originally given to such uses within the period of fifty years before the Act. The original donations, it is admitted, were long anterior to such period. The scheme settled and approved by the Court of Chancery can in no way be considered as the original gift within the meaning of the Act. The Court is not the founder or the donor of the charity. It is merely the authority which has appropriated to educational purposes property originally given to charitable uses. Their Lordships are therefore of opinion that this endowment does not fall within the words which are relied upon, and, consequently, that the objection made to the scheme arising from the want of assent of the old governing body must fail.

This objection is the only one to the scheme in its entirety. But three objections have been submitted to their Lordships upon different parts of the scheme, which, it is said, contravene the provisions of the Endowed Schools Act. One of those objections arises on sect. 11 of the Act, which is in these terms:—"It shall be the duty of the Commissioners in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons are entitled, and that whether as inhabitants of a particular area, or otherwise, to have due regard to the educational interests of such class of persons." Also, by the

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5th clause of the Amendment Act of 1873, it is provided:—"It shall be the duty of the Commissioners in every scheme to have the same regard to the educational interests of persons in a particular class of life as they are by sect. 11 of the principal Act required to have to the educational interests of any particular class of persons."

It is said that these provisions have not been regarded by the Commissioners, because, whilst under the scheme of the Court of Chancery, the boys belonging to the parish of St. Dunstan-in-the-East were entitled to be admitted as day scholars for a sum not exceeding £2 a year, by the scheme of the Charity Commissioners that sum has been greatly exceeded. The scheme of the Charity Commissioners, sect. 40, is this:—"All boys, including boarders, except as herein provided, shall pay tuition fees, to be fixed from time to time by the governors, at the rate of not less than £8 nor more than £16 a year for any boy, except that for any boy whose parent, or person occupying the place of parent, resides or has his place of business or employment in the parish of St. Dunstan-in-the-East, and who is in the opinion of the governors in need of such aid out of the endowment, the tuition fee shall be one half of that which would otherwise be payable by such boy." A similar distinction in favour of the boys of St. Dunstan's parish is made in the case of boarders; a distinction, it is to be observed, which was not made in their favour, as boarders, in the Chancery scheme.

Although the Charity Commissioners have increased the amount which the boys of St. Dunstan's parish are liable to pay for tuition fees, and have added the condition that the trustees shall be satisfied that aid is needed by the parents of such boys, their Lordships cannot say that they have failed in their duty to have due regard to the educational advantages of the class of persons entitled to favourable distinction under the former scheme. It is perfectly true that they have altered those conditions, but it was entirely within their power to do so, as the Act enables them to modify educational privileges and advantages; and their Lordships certainly would not interfere with their discretion in making alterations and modifications, unless they saw that it was so wrongly exercised that the Commissioners could not have paid due regard to these privileges and advantages. Changes may happen in

parishes which may render it desirable to modify existing privileges: the education given may be better; the means of parents living in the parish may be more ample; all matters of this kind may be taken into consideration by the Commissioners, whilst having due regard to the interests of the classes entitled to educational advantages. It is for them to decide on the extent and degree of modification which new circumstances may require to be made, and it is not for this Committee to override their discretion, unless they are satisfied that it contravenes the provisions of the Act.

The next objection arises upon sects. 18 and 19 of the Endowed Schools Act. The scheme of the Court of Chancery, sect. 37, provides that "there shall be four masters of the school. The head and second masters shall be graduates of one of the English Universities, or of Trinity College, Dublin; and all the four masters shall be members of the Church of England, and competent to give instruction in the various branches of education hereinafter mentioned;" and sect. 44 of the Chancery scheme provides that "the instruction to be afforded in the school shall include the principles of the Christian religion, according to the doctrine of the Church of England." It was contended that having regard to these provisions, the 65th section of the scheme of the Charity Commissioners, providing that "no person shall be disqualified for being a master in the college by reason only of his not being or not intending to be in holy orders," was unauthorised and wrong. By the Endowed Schools Act it is provided in sect. 18:—"In every scheme (except as hereinafter mentioned) relating to an endowed school the Commissioners shall provide that a person shall not be disqualified for being a master in such school by reason only of his not being or not intending to be in holy orders." The exception is contained in sect. 19, which enacts as follows:—"A scheme relating to," sub-sect. 2:—"Any educational endowment the scholars educated by which are in the opinion of the Commissioners (subject to appeal to Her Majesty in Council, as mentioned in this Act) required by the express terms of the original instrument of foundation, or of the statutes or regulations made by the founder or under his authority in his lifetime, or within fifty years after his death (which terms have

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been observed down to the commencement of this Act), to learn or to be instructed according to the doctrines or formularies of any particular church, sect, or denomination, is excepted from the foregoing provisions respecting religious instruction and attendance at religious worship (other than the provisions for the exemption of day scholars from attending prayer or religious worship, or lessons on a religious subject, when such exemption has been claimed on their behalf), and respecting the qualification of the governing body and masters (unless the governing body, constituted as it would have been if no scheme under this Act had been made, assents to such scheme)." The governing body, of course, have not assented to the provision complained of. The question is, whether the present endowment falls within this exception. That raises very much the same question as the first which their Lordships have discussed. The words to be construed are:— "Any educational endowment the scholars educated by which are required by the express terms of the original instrument of foundation, or of the statutes or regulations made by the founder or under his authority in his lifetime, or within fifty years after his death, to be instructed according to the doctrines of a particular church, shall be excepted." The original foundation of these endowments, as far as we know it, does not provide for the religious education of scholars. In fact, the original foundation, except with regard to an annuity of £10, has nothing to do with education at all. The words of the Act clearly apply to the original foundation by the founder or donor of the property for charitable uses, and to statutes and regulations made by him, and cannot be held to comprehend a scheme of the Court of Chancery appropriating to educational purposes property which had been already given for charitable uses. Their Lordships, therefore, think that this objection also fails.

The only remaining objection, upon which there has been a good deal of discussion, relates to the sum of £120 "for management," which is included in the list of payments applicable to other than educational purposes in the Chancery scheme, and is omitted from the income now assigned to the old trustees. The second section of the scheme of the Charity Commissioners provides for the appropriation of income to uses other than educational, as fol-

lows:—" The yearly or other sums applicable under the clauses of the above-mentioned Chancery scheme numbered respectively, 25, 26, 27, 28, 29, 31, 32, and 33, except the sum payable for 'management'—such yearly sums, except as aforesaid, being the part of the endowment of the foundation applicable, subject, as in that scheme provided, for purposes not educational, shall be paid out of the income of the foundation, by the governing body hereinafter constituted and called the governors, to the trustees constituted under the said Chancery scheme." All therefore which was appropriated to charities other than educational by the Chancery scheme is still to be paid, except the sum of £120 for management.

The right to petition Her Majesty to withhold her approval from a scheme depends, as far as this question is concerned, on sects. 39 and 24 of the Endowed Schools Act. The part of sect. 39 which is relied on is sub-sect. 3: " If the governing body of any endowment to which a scheme relates, or any person or body corporate directly affected by such scheme, feels aggrieved by the scheme on the ground:—(3) of the scheme being one which is not within the scope of or made in conformity with this Act;" such governing body may petition Her Majesty. It is said that this scheme is not made in conformity with the Act, because it contravenes sect. 24, sub-sect. 1, which is this:—" Where part of an endowment is an educational endowment within the meaning of this Act, and part of it is applicable or applied to other charitable uses, the scheme shall be in conformity with the following provisions (except so far as the governing body of such endowment assent to the scheme departing therefrom), that is to say:—(1) the part of the endowment or annual income derived therefrom which is applicable to such other charitable uses shall not be diverted by the scheme from such uses." No part of the money which, by the scheme of the Court of Chancery, is directly made applicable to charitable uses is diverted by the new scheme. But it is said it throws upon the old trustees the expenses of management. Now, that is by no means clear in point of fact. Under the Chancery scheme the trustees had the whole management and control of the property. But by virtue of the Act, and of the present scheme of the

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Commissioners, the property is vested in the official Trustee of Charity Lands, and is to be managed and administered by the governors under that scheme. They alone have the management of the property, and are responsible for it; and they are to pay, and the trustees to receive, certain specific sums for specific purposes. The provision made by various clauses of the Chancery scheme, for the management of the property and payment to those who managed it, seems to be superseded by the new provision made for its management by the scheme of the Commissioners. Their Lordships are not satisfied upon the facts, as far as they have been brought to their knowledge, that the Commissioners have contravened the provisions of the Act in not continuing to the trustees the sum assigned for the expenses of management in the scheme of the Court of Chancery.

Their Lordships therefore are of opinion that this petition fails, and that no grounds have been established for advising Her Majesty to withhold her approval from the scheme of the Commissioners. They have considered the question of costs, but are not disposed to make any order with regard to them.

Solicitors for Petitioners: *J. E. Shearman & Son.*
Solicitors for Respondents: *Farrer & Co.*

[PRIVY COUNCIL.]

THE QUEEN . . . . . APPELLANT; J. C.*

AND 1882

SIR NARCISSE FORTUNAT BELLEAU, KNIGHT, AND OTHERS . . . . . } RESPONDENTS. *May* 4, 5; *June* 20.

AND CROSS APPEAL.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Act (16 *Vict. c.* 235)—*Construction—Debentures issued by Trustees of the Quebec Turnpike Roads.*

Held, that the debentures in suit which had been issued under the authority of the Canadian Act (16 Vict. c. 235) by the trustees of the Quebec turnpike roads, appointed under Ordinance 4 Vict. c. 17, and empowered thereby to borrow moneys "on the credit and security of the tolls thereby authorized to be imposed, and of other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the Ordinance, and not to be paid out of or chargeable against the general revenue of this province," did not create a liability on the part of the province in respect of either the principal or the interest thereof:

Held, further, that the province of Canada had not by its conduct and legislation recognised its liability to pay the same. The 7th section of the Act 16 Vict. expressly took away the power which had been conferred by the 27th section of the Ordinance to make advances out of provincial funds for the payment of interest, and by its proviso distinguished these debentures from those which had a provincial guarantee.

APPEAL and cross appeal from a judgment of the Supreme Court (Feb. 10, 1881), which substantially confirmed a judgment of the Exchequer Court (Dec. 24, 1879).

The questions raised were whether the appellant could legally be held liable to the respondents for the payment at maturity of the debentures in suit, together with interest thereon from the date of the falling due of the same or from the date of the filing of a petition of right by the respondents. The first Court decided that the appellant was liable for the principal but not the interest, the second Court decided on appeal and cross appeal that the

* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, and SIR RICHARD COUCH.

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appellant was liable both for principal and for interest from the date of filing the petition.

The circumstances appear in the judgment of their Lordships.

The Solicitor-General (*Sir F. Herschell*), and *Jeune*, for the appellant, contended that the sums secured by the debentures were borrowed by the trustees on the credit and security of the tolls, and not under any provincial guarantee. They were issued under the provisions of the Ordinance 4 Vict. c. 17, which had been passed by the Governor and Special Council of Lower Canada, and there was nothing in that Ordinance which authorized the trustees to pledge the credit of the province. On the contrary, it provided that the trustees should raise money on the credit and security of the tolls, and not on the credit of the provincial revenue: see sects. 21, 22. No doubt under the British North-America Act the dominion succeeded to whatever liability the province had created against itself, but it had created none, nor did the Dominion Parliament create or recognise any liability. The whole scope of 16 Vict. c. 235, as well as of the Ordinance was to provide a fund, other than public revenue, out of which the debentures should be paid: see sect. 7. Whatever payments had been made by the province were voluntary payments and created no liability.

Latham (*Benjamin*, Q.C., with him), for the respondents, contended that the judgment of the Supreme Court was right. The appellant had received the moneys as public moneys and was liable to repay the same. The Ordinance of 1841 recognised in its preamble an immediate and urgent necessity, and the trustees were constituted thereby a public corporation acting as the organ and agents of the State in effecting a great public improvement. Sect. 21 on its proper construction does not exempt the province from liability, but directs by implication that the province shall create a special and sufficient fund, by tolls or otherwise, to meet the liability. Reference was made to Canadian Act, 12 Vict. c. 5, and to certain payments made thereunder, to shew that the Government had thereby acknowledged that the roads are public works and that these debentures formed part of the public debt. Also to 14 & 15 Vict. c. 132, and c. 133, 16 Vict. c. 235, and

20 Vict. c. 125, the effect of which legislation it was contended had been to deprive the holders of the debentures of the security for repayment which they would otherwise have had.

Counsel for the appellant were not called on to reply.

The judgment of their Lordships was delivered by

SIR JAMES HANNEN :—

This is a petition of right against the Crown, by the holders of certain debentures issued by "the trustees of the Quebec turnpike roads," for payment of the principal and interest of their debentures.

No question has been raised as to the form in which the suppliants seek to have the question in dispute determined, which is, whether the late province of Canada was liable to pay the principal and interest of the debentures sued on. By the British North America Act, 1867, the debts and liabilities of each province existing at the union were transferred to the dominion of Canada, and it is conceded by the Crown that if the debentures created a debt on the part of the province, the suppliants are entitled to a decision in their favour.

The debentures purport on their face to be and were in fact issued under the authority of an Act of Parliament of the province of Canada (16 Vict. c. 235), intituled "An Act to authorize the trustees of the Quebec turnpike roads to issue debentures to a certain amount, and to place certain roads under their control."

The debentures are in form certificates by the trustees, that under the authority of the said Act there had been borrowed and received from the holder a certain sum bearing interest from the date of the certificate, which sum was reimbursable to the holder or bearer on a day named.

The Act, after reciting that it was expedient to extend the provisions of a certain Ordinance (4 Vict. c. 17) to certain roads other than those to which they then extended, and to such further improvements through the trustees of the roads established under the said Ordinance, and that in order to the construction and completion of the roads then undertaken by the trustees, it was expedient to provide for the raising of the necessary funds by the

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issue of debentures by the said trustees, enacted that the provisions of the said Ordinance, and the provisions of all Acts and statutes in force amending the said Ordinance, and the powers of the trustees appointed under the said Ordinance, should extend or apply to the roads in the said Act mentioned, in the same manner as if the said roads had been mentioned and described in the said Ordinance.

By the 2nd and subsequent sections down to and inclusive of the 6th, the trustees were required to execute certain works, and were authorized to execute others, and the roads are enumerated to which the provisions of the Ordinance were to be extended.

By the 7th section it is enacted that, in order to the making and completion of certain roads described in a previous Act, and the making of the various improvements above mentioned, "it should be lawful for the trustees to raise by loan a sum not exceeding £30,000 currency, and this loan and the debentures which shall be issued to effect the same, and all other matters having reference to the said loan, shall be subject to the provisions of the Ordinance above cited with respect to the loan authorized under it."

This is followed by a proviso which it will be necessary to refer to hereafter. Thus we are obliged, in order to see what were the obligations created by the debentures issued under the 16th Vict. and now sued on, to examine the provisions of the Ordinance 4 Vict. c. 17.

By that Ordinance the Governor was empowered to appoint not less than five nor more than nine persons to be and who and their successors should be trustees for the purpose of opening, making, and keeping in repair the roads thereinafter specified.

By sect. 3 it was enacted that the said trustees might, by the name of the trustees of the Quebec turnpike roads, sue and be sued, and might acquire property and estates moveable and immoveable, which being so acquired should be vested in Her Majesty for the public use of the province, subject to the management of the said trustees for the purposes of the Ordinance.

By the 18th section it was enacted that the roads should be and remain under the exclusive management, charge, and control of the said trustees, and the tolls thereon should be applied solely to

the necessary expenses of the management, making and repairing of the said roads, and the payment of the interest on and the principal of the debentures thereinafter mentioned.

The 21st section is the most important, and is as follows:— "21. And be it further ordained and enacted that it shall be lawful for the said trustees, as soon after the passing of this Ordinance as may be expedient, to raise by way of loan, on the credit and security of the tolls hereby authorized to be imposed, and of other moneys which may come into the possession and be at the disposal of the said trustees, under and by virtue of this Ordinance, and not to be paid out of or chargeable against the general revenue of this province, any sum or sums of money not exceeding in the whole £25,000 currency."

Unless, therefore, it can be shewn that some qualification of these words is to be found expressed or implied in the Ordinance or the statutes amending it, it is clear that the suppliants lent their money on the credit and security of the tolls, "and not to be paid out of or chargeable against the revenues of the province."

Their contention is that, notwithstanding these words, the province was bound to pay the debentures.

The trustees, it is said, were the agents of the province, and in that character they borrowed money for the province, to be applied to provincial purposes; thus the province became the principal debtor, and the tolls are to be regarded only as a first source of repayment of the debt of the province.

These general propositions cannot afford assistance in the consideration of the question we have to determine. It is of no avail to call the trustees agents of the province if it is admitted, as it must be, that the extent and limits of their agency must be sought in the Act of the Legislature which gives them existence. To make the trustees the agents of the province, it must be shewn that by their constitution they have authority to act for the province, and to create obligations binding upon it. But this has not been shewn. The trustees are a corporate body, the absolute creation of the Legislature, and their rights, duties, and powers are exclusively contained and defined in the instrument by which they were incorporated. Such corporations are well known to the

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law as well of this country as of Canada. They are created for a great variety of purposes, some of local, others of general importance. In the present instance the corporation is created for the local object of improving the roads round Quebec, and to this end the trustees are empowered to borrow money on certain specific terms, for the purposes of the trust as defined in the Ordinance. The benefit which the province may be supposed to derive from the expenditure of the money borrowed no more imposes a liability on the province to repay it than it imposes such a liability on the adjoining landowners, the value of whose property may be increased by the construction of the roads authorized to be made.

In order to ascertain the powers of the trustees we must examine the provisions of the Ordinance.

By the 21st section it appears that the loan is to be raised on the credit and security of the tolls authorized to be imposed, and other moneys which may come into the possession, and be at the disposal of, the trustees under and by virtue of the Ordinance. On this it is observed that it does not say the "sole" credit and security of the tolls, &c., but, in the absence of any other credit or security defined by the Ordinance, those only can be looked to which are expressly mentioned. It is, however, evident that it was for the very purpose of guarding against the possibility of the present claim that, in addition to the affirmative words already quoted, negative words were introduced that the loan is "not to be paid out of or be chargeable against the general revenue of the province."

It does not appear possible to use language more carefully framed to exclude from the minds of proposed lenders the idea that they were in any case to look to the province for repayment of the moneys advanced by them.

The only criticism which has been offered upon this passage is that it does not negative the contention that the loan is to be paid out of revenue other than the "general" revenue of the province. But no other revenue can be suggested.

The Government has no power to raise or apply revenue in any other way than is authorized by law. It is obvious that revenue already appropriated to particular objects cannot be diverted from them, and when it is forbidden to apply the unappropriated or

general revenue to the payment of the loan, all possible sources of reimbursement out of the revenue of the province are excluded. It is a contradiction in terms to say that that which the province is by express enactment forbidden to pay out of its revenue remains nevertheless a liability of the province.

The 26th section enacts that it shall be lawful for the Governor, if he shall deem it expedient, at any time within three years from the passing of the Ordinance, and not afterwards, out of any unappropriated public moneys in his hands to purchase for the public uses of the province and from the said trustees debentures to an amount not exceeding £10,000 currency, the interest and principal of and on which shall be paid to the Receiver General by the said trustees in the same manner and under the same provisions as are provided with regard to such payments to any lawful holder of such debentures.

Thus the Governor is enabled to purchase, on behalf of the province, debentures, and so to become the creditor of the trustees, but this power is limited to three years.

This is wholly inconsistent with the idea that the province was already the debtor for the whole amount of the loan.

The province cannot stand in the relation both of debtor and creditor to itself; and if the process be regarded as a means of redeeming the debt of the province, no reason can be suggested why this power of purchasing debentures should be limited in amount and to a period of three years.

The 23rd section enacts that the debentures shall bear interest, and concludes thus:—"Such interest to be paid out of the tolls upon the roads, or out of any other moneys at the disposal of the trustees for the purposes of this Ordinance."

Here there are no negative words excluding the liability of the province, but the obligation to pay interest primarily follows that of paying the principal, and it lies upon the party asserting that it is imposed elsewhere to establish it.

So far from there being anything in the Ordinance to support the contention that the interest is to be paid by the province, everything on the subject of interest tends strongly in the opposite direction.

By the 27th section it is enacted that all arrears of interest

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shall be paid before any part of the principal sum, "and if the deficiency be such that the funds then at the disposal of the trustees shall not be sufficient to pay such arrears, it shall be lawful for the governor for the time being, by warrant under his hand, to authorize the Receiver General to advance to the trustees out of any unappropriated moneys in his hands such sum of money as may, with the funds then at the disposal of the trustees, be sufficient to pay such arrears of interest as aforesaid, and the amount so advanced shall be repaid by the trustees to the Receiver General."

This provision, empowering the Governor General to authorize a loan to the trustees to enable them to pay interest, is inconsistent with the idea that the province was already under an obligation to pay the interest.

If then the case had rested upon the effect of the Ordinance alone, their Lordships are of opinion that no liability on the part of the province for payment of either the principal or interest could be established; but it has been argued that by subsequent legislation and conduct the province of Canada has recognised its liability to pay the principal and interest of the debentures issued under the authority of the Ordinance of 4 Vict.

The first Act which is relied on is the 12th Vict. c. 5, by which it was provided that it "should be lawful for the Governor to redeem or purchase on account of the province all or any of the debentures constituting the public debt of the province of Canada, or such or any of the debentures issued by commissioners or other public officers under the authority of the Legislature of Canada, or of the late Province of Canada, the interest or principal of which debentures is made a charge on the consolidated revenue fund of the province."

It is said that the Government, under the authority of this Act, paid off the debentures issued under the Ordinance.

It appears highly probable, as is stated in the very able judgment of Mr. Justice Gwynne, that the power given to the Governor by the 27th section of the Ordinance to advance, by way of loan, money to the trustees to pay arrears of interest did, in fact, lead to the idea that the province was under a legal liability to pay the interest, and it would seem, though the manner in which the

transaction was carried out is very obscure, that the debentures issued under the Ordinance were, in fact, redeemed under the powers supposed to be conferred by the 12 Vict. c. 5.

All that need be said upon this subject is that, if the Governor did suppose himself to be acting under the authority of this statute, he mistook his powers. The debentures issued under the Ordinance did not constitute part of the public debt of the province, and neither the interest nor principal of them was made a charge on the consolidated revenue fund of the province.

But, whatever considerations may have led to the redemption by the Government of the debentures issued under the Ordinance, it is clear that they cannot affect the construction of the 16 Vict. c. 235, under which the debentures now in suit were issued.

The 7th section of that Act authorized the trustees to raise a loan, which "loan, and the debentures which shall be issued to effect the same, and all matters having reference to the said loan, shall be subject to the provisions of the Ordinance with respect to the loan authorized under it;" but this important proviso is added,—"provided nevertheless that the rate of interest shall not exceed 6 per cent., and no moneys shall be advanced out of the provincial funds for the payment of the said interest."

Thus the power to make advances out of provincial funds for payment of interest which was given by the 27th section of the Ordinance as to the debentures issued under it, and which had possibly led to misconception as to the liability of the province, is expressly taken away by the 16th Vict. as to the debentures now in question.

They must therefore be treated as issued not merely on the express condition that they were not to be paid out of or chargeable against the general revenues of the province, but with the further express condition that no moneys should be advanced out of provincial funds for the payment of interest.

And again, as though for the purpose of guarding against the possibility of the debenture holders contending that the debentures issued under the 16th Vict. had the provincial guarantee, the proviso to the 7th section enacts that "all the debentures which shall be issued under this Act, so far as relates to the interest payable thereupon, shall have a privilege of priority of lien

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upon the tolls, &c., in preference to the interest payable upon all debentures which shall have been issued under the provincial guarantee, or which shall hereafter be issued by the said trustees under the provincial guarantee."

What debentures had been or could be issued under the provincial guarantee does not appear, but this at least is clear, that the debentures issued under the Act, and now sued on, have no provincial guarantee, since they have a preference given to them over all that have, and are thus distinguished from them.

It remains only to consider some general arguments which have been advanced on behalf of the suppliants. It has been urged that the Government of the province, by redeeming the debentures issued under the Ordinance, induced the belief that the same course would be pursued with regard to the debentures issued under the Act of 16 Vict. c. 235, and that without such belief the debenture holders would not have lent their money on the security of the tolls, &c., which had proved entirely insufficient even to pay the interest of the former loan.

Their Lordships do not desire, by any observations, to diminish the force of these arguments, if addressed to the proper tribunal. It may be that the Legislature of the province of Canada or that of the dominion may see reason to listen to the prayer of the suppliants to be relieved in whole or in part from the loss of their money, which has been expended for the benefit of the province. But this tribunal cannot allow itself to be influenced by feelings of sympathy with the individuals affected. Its duty is limited to expressing its opinion upon the legal question submitted to it, and upon that their Lordships entertain no doubt.

Another argument of a similar kind has been based upon a subsequent statute of the province of Canada, 20 Vict. c. 125, by which the Quebec turnpike roads were divided into two parts, and by which it is contended some of the debenture holders have been deprived of a part of the special fund created for the payment of their loan.

Assuming the correctness of this contention, it might have been made a ground for opposing the later enactment, or it may now be used by way of appeal to the Legislature for redress, but it cannot supply a reason for putting a construction on the obliga-

tions created by the 16 Vict. c. 235, different from that which must have been put upon them immediately after the passing of that statute.

Some minor points have been relied on by the learned Judges who have held that the suppliants were entitled to succeed on this petition. It is from no disrespect to those learned Judges that these points have not been particularly dealt with, but from a belief that, however they may tend to fortify the general argument in support of which they are used, they do not by themselves afford a basis upon which their Lordships' judgment can be founded.

For these reasons, their Lordships are of opinion that the judgment of the Exchequer Court of Canada, as well as the judgment of the Supreme Court confirming the judgment of the Exchequer Court so far as it decided that the respondents were entitled to the principal of their debentures, but varying the same by declaring that the respondents were entitled in addition to the principal to interest from the date of filing the petition of right, are erroneous, and their Lordships will humbly advise Her Majesty that they should be reversed and judgment entered for the Crown.

Their Lordships are further of opinion and will advise Her Majesty that the cross appeal of the respondents asserting the liability of the Crown to pay interest on the debentures from the date of their falling due should be dismissed, and that the costs of the appeal and of the cross appeal and of the proceedings in the Courts below should be paid by the respondents.

Solicitors for appellant: *Bompas, Bischoff, & Dodgson.*
Solicitors for respondents: *Harwood & Stephenson.*

[PRIVY COUNCIL.]

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THE RIGHT REVEREND NATHANIEL JAMES MERRIMAN, D.D. . . . . } PLAINTIFF;

AND

THE VERY REVEREND FREDERICK HENRY WILLIAMS, D.D. . . . . } DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Status of Church of South Africa—Endowments of the Church of England in South Africa—Construction of Articles of Constitution—Effect of Proviso repudiating Privy Council Decisions.

The Church of the Province of South Africa is not a Church in connection with the Church of England as by law established.

Although there are in the articles of the constitution of the Church of the Province of South Africa general expressions affirming in the strongest way the connection of the Church of the Province with the Church of England, and its adherence to the faith and doctrine of the Church of England, yet by the proviso in the said articles to the effect that in the interpretation of such faith and doctrine it is not bound by the decisions of the tribunals of the Church of England, it is practically declared that the connection is not maintained.

In a suit by the Bishop of Graham's Town (one of the dioceses of the Church of the Province) against the officiating minister in possession of the church of St. George in Graham's Town to enforce sentences of the Diocesan Court of Graham's Town, whereby the defendant, a member of the Church of the Province, subject to its constitution and canons, and to the episcopal jurisdiction of the plaintiff, had been found guilty of contumacious disobedience, suspended from his ministerial functions until he should engage not to repeat the offence of preventing the bishop from preaching or ministering in the church of St. George, and finally excommunicated; it appeared that the church of St. George had been duly dedicated to ecclesiastical purposes in connection with the Church of England as by law established, and for no other purposes, and was held by trustees for those purposes:—

Held, that the plaintiff had no right in the said church of St. George, and that his suit must be dismissed.

APPEAL from a judgment of the Supreme Court dated 26th August, 1880, in a suit brought by the appellant on the 24th February, 1880.

* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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The main question decided in this appeal is whether or not the Church of South Africa is a Church in connection with the Church of England as by law established. It arose in reference to the church of St. George in Graham's Town, which had been conveyed to successive trustees upon condition that it should for ever thereafter be used for ecclesiastical purposes in connection with the Church of England. The circumstances under which it arose are detailed in the judgment of their Lordships. They relate to a dispute between the appellant and the respondent, and to the right of the former to preach in the church of St. George.

The declaration averred that the members of the "Church of the Province of South Africa, otherwise known as the Church of England, or the English Church, or the Church of the Anglican Communion in these parts," had adopted certain rules for enforcing discipline within their body which were binding upon them, and had agreed that the provincial synod should be their legislative body, and that the Diocesan Court of Graham's Town was a competent tribunal in this behalf.

It then referred to the letters patent constituting the see of Graham's Town, and to the power to appoint dignitaries given by them, to the creation of the deanery, and the constitution of the cathedral church, and alleged that the Bishop of Graham's Town in his episcopal capacity had, and had exercised, the right of officiating and performing all ecclesiastical functions within the cathedral church.

The declaration then set out the dealings with the property forming the site of the cathedral. It then set out the appointments of the respondent as Dean and Rector of the Cathedral Church of St. George, and alleged that he was bound by the rules of the provincial synod, set forth the proceedings in the Diocesan Court, by which the respondent had been found guilty of contumacious disobedience to the plaintiff, and first suspended, and then finally excommunicated; and concluded by averring that the respondent had not submitted himself to the sentences pronounced by that Court.

The declaration then prayed the Court by its judgment to declare that the respondent was one of the clergy of the said Church and bound by its laws; that he was bound to submit to

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the sentences of the Diocesan Court, and that he was lawfully suspended from his office; that the appellant in his episcopal capacity had the right to officiate in the cathedral church, and to have free access to the land and premises. And it further prayed for a perpetual interdict, restraining the respondent from hindering the appellant in his lawful ministrations, and from officiating as a dignitary or priest of the said church, or receiving any emoluments in respect thereof within the diocese of Graham's Town.

The respondent by his pleas claimed to be a priest of the Church of England as by law established, senior colonial chaplain at Graham's Town, and rector of the church of St. George, Graham's Town. He admitted the existence within the colony of a religious association styling itself the Church of the Province of South Africa, which he said was entirely independent of, and distinct from, the Church of England as by law established, and of which he said that he was not a member. He denied that the appellant was a bishop of the Church of England as by law established, or that he had any right in the church of St. George, the trusts whereof he alleged to be for the Church of England as by law established, and he disputed the validity of the transfer of the church made in 1871, by which it had been conveyed to the Board of Diocesan Trustees for the diocese.

To this was added a denial of most of the allegations contained in the declaration.

By a second plea he raised a question of the validity of the constitution of the Diocesan Court of Graham's Town.

To this second plea the appellant specially replied, and there was a formal rejoinder.

The Court unanimously decided that the respondent should have "absolution from the instance" with costs.

The Chief Justice pointed out that the real question to be decided was the legal status of the two parties in respect of the cathedral church of St. George, Graham's Town. For his decision he mainly relied upon the facts that the appellant was not Bishop of Graham's Town within the meaning of the letters patent, that the Crown might even now appoint, and the Archbishop of Canterbury ordain and consecrate, a bishop under the letters patent, that

the appellant was also not Bishop of Graham's Town within the meaning of the transfer of 1871, and that the trusts of the cathedral, being for the Church of England, were inconsistent with its being claimed or used by the appellant as a bishop of the Church of the Province of South Africa, which was a different Church, and that the appellant's claim was contrary to Ordinance No. 2 of 1839.

The Chief Justice also stated that the respondent was not estopped from shewing that the church of St. George, and the respondent himself as colonial chaplain and de facto rector of that church, were not under subjection to the appellant or to the provincial synod, and that to entitle the appellant to the declarations and interdict which he prayed, other parties ought to have been added as defendants, and on all these grounds he decided against so much of the declaration as related to the user of the cathedral.

With regard to the other parts of the prayer, he inclined to think that the constitution of the first Diocesan Court was regular, but he decided that the respondent held no office as dignitary or priest of the Church of the Province of South Africa, and that as he had been excommunicated the appellant could not ask to have it declared that he was still one of the clergy of that Church, but in order not to debar the appellant from having his legal status declared in a proper suit, he entered the judgment as absolution from the instance, instead of for the defendant.

Mr. Justice Dwyer concurred in all the grounds stated by the Chief Justice on behalf of the respondent. He went further, and held that the respondent never was a member of the Church of the Province of South Africa, but that if he ever was he had withdrawn by his protest, that the constitution of the Diocesan Court was bad, and the sentence pronounced utterly void.

Mr. Justice Smith held that the respondent had by his acts precluded himself from denying that he had been a member of the Church of the Province of South Africa, and doubted whether the appellant was not entitled to an interdict restraining the respondent from interfering with the exercise of his lawful episcopal functions, but, having regard to the questions of property raised, and the absence of the necessary parties for the decision

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of those questions, he concurred in the judgment of absolution from the instance.

Davey, Q.C., and *Jeune* (*Muir Mackenzie* and *Dale Hart* with them), for the appellant:—

The contentions are, first, that the appellant, Bishop Merriman, is the successor of the Bishops of Graham's Town, and as bishop of that diocese in the Church of South Africa is entitled to exercise over the respondent as one of his clergy, and over the cathedral church of St. George, the authority which is disputed in this case; second, that the Church of the Province of South Africa is a branch of the Church of England.

The evidence shews that the church of St. George was originally government property. The practice was to appoint the colonial chaplain as the officiating minister or rector of that church. Reference was made to Ordinance No. 2 of 1839, the letters patent of 1847 creating the see of Cape Town, and the grant of the church in 1849. In 1853 a constitution and representative Parliament were established in the colony; after which the letters patent, without being wholly void, had no power to create coercive, as distinct from consensual, jurisdiction. Thereupon Bishop Gray resigned his bishopric under the letters patent of 1847, the diocese was divided into those of Cape Town, Graham's Town, and Natal, followed by the patents of appointment of the three bishops, Bishop Gray becoming thereunder the metropolitan. In 1857 fresh letters were issued appointing Bishop Cotterill Bishop of Graham's Town in the place of Bishop Armstrong, deceased, making him a body corporate. Reference was then made to Act 30 of 1860, authorizing a transfer of certain immoveable property in Graham's Town by the Bishop of Cape Town to the bishop of the diocese. In 1863 (March 4) the site of St. George's Church, as specified in the grant of 1849, was thus transferred, subject to the condition as expressed in the former grant that it should be "for ever thereafter used for ecclesiastical purposes in connection with the Church of England, and to and for no other use or purpose whatsoever." It was only a transfer of the legal estate and did not affect the trusts. In 1860 and 1863 the first sessions of the synod of the Diocese of Graham's Town were held under the

presidency of the bishop, at which acts rules and regulations were made and promulgated. In 1865 the respondent received his appointment as dean of the cathedral from the bishop, and at the same time was appointed by the Government colonial chaplain on the recommendation of the bishop. He then took the oath of obedience to the bishop and his successors; i.e., not letters patent successors, but consensual successors; and he at the same time agreed to be bound by the rules and regulations of the diocesan synod, except where they were contrary to the laws of the Church of England. There was no precise evidence as to how the respondent came to be appointed to the rectory of St. George, but he received the keys from the vestry, and was inducted by the bishop. In 1867 and 1869 sessions of the synod of the diocese of Graham's Town were held, and the respondent took an active part therein. In 1870 the first provincial synod of the Church of the Province was held at Cape Town, presided over by the then Metropolitan. The respondent was present and took part in the proceedings. At this synod various articles were passed, and the constitution and canons of the Church of the Province agreed upon. Reference was made to those articles, and it was contended that they were merely an agreement between the parties giving themselves a corporate organization. They declared themselves members of the Church of England, provided for election of bishops and for tribunals. Then came the transfer of the site of St. George's Church from Bishop Cotterill to the diocesan board of trustees. In the same year Bishop Cotterill resigned, and the appellant was elected under the provisions of the constitution and canons of the Church (the respondent presiding at his election and voting for him), and consecrated in his place, and thereafter exercised full rights of bishop. In 1873 the fifth session of the diocesan synod was held under the presidency of the appellant as bishop, and the respondent took part in the proceedings. In 1875 the respondent first raised objection to the appellant as bishop, and disclaimed the jurisdiction of the Church of South Africa. In 1878 ensued a correspondence between the appellant and respondent which led to a rupture, in which the only point raised was whether by English church law the dean could exclude the bishop from the cathedral pulpit. Then came the dispute in the cathedral, and the proceedings in the Diocesan Court which,

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under canon 23, clause 1, sect. 6, and subsequently under canon 19, clause 15, and canon 21, clause 1, sentenced the respondent as above stated.

It was contended that under these circumstances the respondent was by his promise and conduct bound by the rules of the provincial synods as well as by the rules of the diocesan synods, and had submitted himself to and agreed to be bound by the sentences of the ecclesiastical tribunals established thereunder. As regards his alleged status as dean, Bishop Cotterill's letters patent of 1857 did not authorize him to create a deanery or anything but a titular dean, and the respondent had no rights in the cathedral except such as he derived by agreement under the voluntary religious association to which he belonged. He had no rights of access to the cathedral except by permission of the trustees. Then with regard to the appellant, he is a successor of Bishop Cotterill's, and a bishop of a Church in connection with the Church of England within the meaning of the trusts created by the grant of 1849, and never since varied. He is therefore an object of the trusts upon which the church of St. George is held, and is entitled to the relief which he prays in reference thereto. Reference was made to the Constitution of 1870. No doubt the Bishop of Natal was not a member of the synod which passed it, but there may be two voluntary associations in connection with the Church of England. As regards the proviso relating to the decisions of the Privy Council, it only states what is really the fact, that as an unestablished Church the association is not bound by those decisions. The jurisdiction of the bishop was wholly consensual, his position *quâ* bishop was neither better nor worse for having letters patent: see *Long* v. *Bishop of Cape Town* (1), decided in 1863; *In re Bishop of Natal* (2), decided in 1864; *Bishop of Natal* v. *Gladstone* (3), decided in 1866; *Bishop of Cape Town* v. *Bishop of Natal* (4); *Cairncross* v. *Lorimer* (5).

Even suppose there was a severance between the two churches, it did not follow that the preaching of the bishop could not be a performance of the use for which the land was held, or that there was any breach of trust by the respondent in permitting it, or in

(1) 1 Moore, P. C. (N.S.) 411.
(2) 3 Moore, P. C. (N.S.) 115.
(3) Law Rep. 3 Eq. 1.
(4) 6 Moore, P. C. (N.S.) 203; Law Rep. 3 P. C. 1.
(5) 7 Jur. (N.S.) 149.

having agreed to permit it. There was no suggestion of any unsound doctrines, inconsistent with those of the Church of England, the bishop being himself an ordained clergyman of that Church. Mere variation in formation and organization does not prevent church union or connection.

Charles, Q.C., and Dr. *Phillimore*, for the respondent:—

The main question raised is as to the status of the Church of South Africa. Another question is, what was the position of Bishop Merriman in relation to St. George's Cathedral at the date of his consecration.

With regard to St. George's Cathedral, neither the appellant nor the provincial synod had any rights to or in either the site or the building. Under the Ordinance 2 of 1839, an elected vestry and churchwardens had the management of the cathedral. The officiating minister was ex officio chairman of the vestry, and received from them the keys, and with the keys the possession of the building. The site was originally Crown land, the church was built on Crown land, and, by the grant of 1849 to the then Bishop of Cape Town trusts were imposed upon it for the benefit of the Church of England. Those trusts have never been varied. It is questionable whether the site, which had been vested in the earlier corporation known as the Bishop of Cape Town, had ever vested in the subsequent corporation known as the Bishop of Cape Town. With regard to the later transfer to the trustees in 1871, that does not appear to have had the consents required by Act 30 of 1860, and was invalid. With regard to the valid grant of 1849, the Crown had power to declare therein the rules and regulations under which the church should be held. It did not do so, and the only regulation declared after 1849 by the grantor was in the letters patent of 1853. Bishop Armstrong's position in reference to the cathedral was that he had a right of access thereto by virtue of the document which created St. George's Church the cathedral church, in the same way as Bishop Colenso had right of access to the Cathedral of Natal: see *Bishop of Cape Town* v. *Bishop of Natal* (1). As for the legal ownership of the church, that was assumed by the Act of 1860 to be vested in the bishop, but

(1) Law Rep. 3 P. C. 13.

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apart therefrom it was apparently in the Crown. Assuming that Bishop Cotterill made a valid transfer by the deed of 1871, the trusts thereof are inconsistent with the trusts on which the land was held. For upon the resignation of Bishop Cotterill he had no successors within the meaning of the letters patent of 1857. The appellant was consecrated by the Bishop of Cape Town, and has no right or title to any access to this church as his cathedral. He was not named by the Crown or consecrated by the Archbishop of Canterbury, and therefore does not possess either qualification contemplated by the letters patent. Even if the church had been made a cathedral it was not made the appellant's cathedral. Consecration did not make him a successor to Bishop Cotterill. To ascertain that one cannot go behind the letters patent. Besides his not fulfilling the qualifications imposed by the only document which regulates his right of access to the cathedral, he was a bishop of the Church of South Africa, and as such not an object of the trusts on which the church was held.

With regard to the status of the Church of South Africa, there was a broad distinction between what happened in the provincial synod and the previous diocesan synods of 1860 and 1863. It was after 1863 that the then Bishop of Cape Town had attempted to force upon Mr. Long the duty of attending the synod, and had summoned and deposed Bishop Colenso for teaching heretical doctrines. Then came the decisions cited on the other side, and also *Williams* v. *Bishop of Salisbury* (1) and *Martin* v. *Mackonochie* in 1868 (2).

These decisions, together with the case of *Gorham* v. *Bishop of Exeter* (3), declared the law of the Church of England. Then came the provincial synod of 1870, which by its articles of constitution (see especially the proviso to clause 1) constituted an association not governed by those decisions, and thereby effected a severance from the Church of England, and effected essential variations between the two Churches in regard to their several standards of faith and doctrine. The new Church was not to be bound by any decisions except those of its own ecclesiastical tribunal, constituted in a totally different spirit from that in which

(1) 2 Moore, P. C. (N.S.) 375. (2) Law Rep. 2 P. C. 365.
(3) Moore's Rep. (Ed. 1852.)

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the English Church has since the Reformation constituted its Courts. The appellant, therefore, not merely has not made out his title as successor within the meaning of the grant by the Crown, but if he is successor, he succeeds as a bishop of a different Church from that contemplated by the grant.

It is not enough to say that the defendant might lawfully have permitted the plaintiff access to the cathedral and its pulpit. Nothing which the respondent did has affected his position as officiating minister so as to confer on the appellant the right which he claims: *M'Allister* v. *Bishop of Rochester* (1). It was not competent to the respondent as Crown chaplain and officiating minister to contract away his rights and duties to his trust and the objects of the trust: *Bishop of Natal* v. *Gladstone* (2); *In re Bishop of Natal* (3).

Further, the action is defective for want of the necessary parties —the trustees and the vestry—and no relief can be granted in this suit affecting the rights of those who are not parties to it. The appellant cannot derive from contract with the respondent the rights which he claims, and, as regards the decision of the Diocesan Courts, they were not properly constituted, since two canons were not assessors. Even if they had been, the appellant, as a judge of a consensual body, cannot sue to enforce his own decisions, which confer rights on parties other than himself, and it devolves upon them to institute the proceedings: *Lang* v. *Purves* (4).

Davey, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

In this case the plaintiff in the Court below and the appellant here is the Bishop of Graham's Town, one of the dioceses of the province of the Church of South Africa. The defendant in the Court below and the respondent here bears the title of Dean of Graham's Town; he is also the colonial chaplain appointed by

(1) 5 C. P. D. 194.
(2) Law Rep. 3 Eq. 43.
(3) 3 Moore, P. C. 155.
(4) 15 Moore, P. C. 389.

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the Crown for Graham's Town; and he is de facto the officiating minister, sometimes called the rector, of the church of St. George in Graham's Town. The controversy between the parties has raised a very important question, but its earlier phases are comparatively unimportant, and may be briefly stated.

In the year 1878 a difference of opinion arose respecting the right to preach in the church of St. George. The plaintiff claimed it as his cathedral, in which he had a right to preach whenever he thought fit. The defendant was willing to allow the plaintiff to preach whenever he thought fit as a matter of courtesy; but as to the matter of right, he held that he as dean had control over the arrangements. The plaintiff would not consent to preach except as a matter of right.

On the 17th of April, 1879, the plaintiff attended the church with the object of preaching, having previously admonished the defendant in a formal way not to hinder him, but the defendant anticipated the usual time for the delivery of the sermon, and began to preach himself, whereupon the plaintiff protested and left the church.

For this conduct the defendant was presented in the Diocesan Court of Graham's Town, and was there found guilty of contumacious disobedience, and of conduct giving just cause of offence or scandal to the Church; and he was suspended from his ministerial functions for one calendar month, and further until he should engage not to repeat the offence of preventing the bishop from preaching or ministering in the church of St. George. As the defendant refused to obey that sentence, he was excommunicated by a subsequent decree of the same Court.

The present suit was instituted to enforce the sentences of the Diocesan Court. By his declaration, filed on the 21st of April, 1880, after shewing that he and the defendant are officers of the Church of the Province of South Africa, the plaintiff prays relief in the following terms:—

"Wherefore the plaintiff says that an action has accrued to him, and he prays that this honourable Court will by its judgment declare—

"That the defendant is one of the clergy of the said Church within the true intent and meaning of Article XXIV. of the

Constitution thereof, and is bound by the laws of the said Church, and by the rules and regulations made by the said diocesan synod of Graham's Town, and by the said provincial synod, or either of them.

"That the defendant is bound to accept and immediately submit to any sentence depriving him of any or all of the rights and emoluments appertaining to the office of dean and rector of the cathedral church of St. George, or to any other office or benefice held or enjoyed by him as dignitary or priest of the said church within the diocese of Graham's Town, such sentence having been passed upon him after due examination had by the Diocesan Court of Graham's Town, being a tribunal acknowledged by the provincial synod for the trial of a clergyman, saving all rights of appeal allowed by the said provincial synod.

"That under and by virtue of the sentences passed upon the defendant by the Diocesan Court of Graham's Town, on the 5th of August and the 13th of November, 1879, respectively as aforesaid, the defendant is lawfully suspended from his office of priest and other spiritual promotion and dignity, with total loss of all emoluments derived from any benefice or attached to any office or offices heretofore held by him as dignitary or priest of the said church within the diocese of Graham's Town.

"That the plaintiff in his episcopal capacity has the right of officiating and performing all ecclesiastical functions within the said cathedral church.

"That the plaintiff, in his said capacity, shall have free and uninterrupted access to the land and premises comprised in the transfer bearing date the 17th of June, 1871, to the trustees under the Diocesan Trust Board of the diocese of Graham's Town, of the site of the said cathedral church of St. George, and to the said church or cathedral or other buildings erected thereon, for the purpose of enjoying and exercising all rights, privileges, and immunities, which have heretofore been enjoyed and exercised or ought to be enjoyed and exercised by the Bishop of Graham's Town as such bishop or otherwise, in reference to or within the cathedral thereon and its appurtenances, and that the defendant and his agents shall be restrained from in any manner interfering with such access, enjoyment, or exercise.

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"And the plaintiff further prays that this honourable Court will grant a perpetual interdict restraining the defendant from hindering the plaintiff in his lawful ministrations within the diocese of Graham's Town, and further restraining the defendant from officiating or performing any ecclesiastical functions whatsoever, and from receiving any emoluments in respect of the performance of any ecclesiastical functions whatsoever within the limits of the diocese of Graham's Town, as a dignitary or priest of the said Church."

By his pleas the defendant claims to be rector of the church of St. George, and to perform ecclesiastical functions in that church as a priest of the Church of England as by law established. He says that the Church of the Province of South Africa is a religious association entirely independent of the Church of England as by law established; that he himself is not a member of that Church, nor bound by its constitutions or canons; that the church of St. George is held in trust for ecclesiastical purposes in connection with the Church of England as by law established; and that the plaintiff and the Church of South Africa have no authority or jurisdiction over it.

On the 26th of August, 1880, the Supreme Court pronounced a decree absolving the defendant from the instance with costs against the plaintiff. The ground principally relied on by the Chief Justice, Sir Henry De Villiers, was that the church of St. George had been devoted to ecclesiastical purposes in connection with the Church of England, and that the Church of South Africa was not, so far as the circumstances of the colony would permit, a part of the Church of England. Mr. Justice Dwyer concurred, but he also thought, contrary to the opinion of the Chief Justice, that the defendant had not so acted as to give the plaintiff the episcopal jurisdiction claimed by him. Mr. Justice Smith expressed no opinion on the main question decided by the Chief Justice, doubting whether it could be properly raised in this suit; but he concurred in the decree on the ground that the necessary parties for discussing that question were not before the Court.

Their Lordships have now to consider whether this decree is right. Before entering on the discussion they wish to say that in the careful and elaborate judgment of the Chief Justice the case

is treated with a gravity befitting its importance, and every topic in turn is handled with a fulness and clearness which are of the greatest assistance to those who have to review it.

They also wish to state their sense of the judicial method and impartiality which marks the proceedings of the Diocesan Court. An objection has been raised to those proceedings on the ground that the Court was improperly constituted, and Mr. Justice Dwyer was of that opinion; but in the view which their Lordships take of the case it is not necessary to express any opinion on that point.

Turning now to the plaintiff's prayer, it is clear, and it has not been disputed by his counsel at the Bar, that the greater part of it asks relief which is beyond the competence of the Civil Court to grant in this suit.

The defendant is not receiving any emolument except as colonial chaplain, nor does he hold any benefice in the Church of South Africa, unless it may be the incumbency of the church of St. George. It is clear therefore that there is no question before the Civil Court except that which relates to the use of the church of St. George, and that the relief prayed must be confined to such an execution as under the circumstances may be proper of the trusts upon which the church of St. George is held.

In order to entitle himself to that amount of relief the plaintiff must shew, first, that he is a proper object of the trusts, and secondly, that both as between himself and the Defendant and as between himself and other objects of the trusts, he is entitled to have the Defendant restrained from and himself admitted to the use of the church in question. The first thing then to be ascertained is the precise position of the property in dispute.

It is clear that the site had at some time been vested in the Crown. It does not appear by whom the church was built, but prior to the year 1839 its affairs were regulated by a committee called the Church Committee. It seems to have been the practice for the colonial chaplain appointed by the Crown to become the officiating minister of the church. It is not possible upon the materials in this record, and perhaps is not important, to ascertain more precisely the state of things prior to 1839.

On the 23rd of January, 1839, an Ordinance was passed by the Governor of the Colony of the Cape of Good Hope, with the advice

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and consent of the Legislative Council and House of Assembly of that colony. It recites as follows :—

"Whereas it is expedient that the inhabitants of Graham's Town and the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by law established, should be invested with the right and privilege of choosing and appointing, under certain regulations, a vestry and churchwardens for the better and more effectual administration and management of all matters connected with the church of Graham's Town, commonly called St. George's Church, and that the said vestry and churchwardens after having been duly appointed should possess certain powers and perform certain duties as the same are usually possessed and exercised by such officers according to the customs and usages of the said United Church of England and Ireland. And whereas on the appointment of the said vestry and churchwardens it is expedient that the office of church committee as at present constituted should cease and determine."

Provisions are then made for the election of a vestry and churchwardens by the male inhabitants of Graham's Town and of the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by law established.

The officiating minister is to be chairman of the vestry, when present, and, by sect. 8, the vestry are to make rules for their own guidance, "and for more effectually executing the provisions of this Ordinance, and also to take such order for the management of the said church as to them shall seem expedient. Provided that the rules contain nothing repugnant to law or to the tenor of this Ordinance, or to the customs and usages of the United Church of England and Ireland as by law established."

By sect. 10 the vestry are to have the same powers, rights, and duties as were then possessed by the church committee.

Sect. 12 empowers the vestry to maintain suits in performance of the trusts reposed in them.

Sect. 14 provides for the keeping of accounts, which are to be audited and to be laid before the church members at a general annual meeting.

Sect. 15 provides for the election of churchwardens, to exercise the usual functions of English churchwardens so far as applicable to the colony.

Sect. 19 enacts that there shall be set apart in the church pews and seats for the civil and military authorities, the minister, the officers of the garrison, and for troops and poor people.

Their Lordships consider the meaning and effect of this Ordinance to be reasonably clear. Whatever may have been the exact rights of the Crown and the inhabitants as between one another, the church was, at the date of the Ordinance, property used for religious purposes. It was desired to place the arrangements on a more public and permanent basis, and to have a governing body more responsible and efficient than the church committee. For that purpose the machinery of election is put in motion. The persons so elected are called a vestry and churchwardens in analogy to the English parochial system, but they are elected by the church members, not by the parishioners at large. The churchwardens receive powers analogous to those of English churchwardens. But over and above that, the vestry are clothed with duties and trusts, and made subject to liabilities, for the benefit partly of the church members and partly of the Government, such as appertain only to the trustees and managers of what we should in this country call a charitable endowment. It would be exceedingly difficult for the Crown to contend that the Ordinance did not effect a permanent dedication of the site to charitable uses. But that point need not be discussed, because such a dedication was undoubtedly effected by the next transaction.

On the 7th of June, 1849, the Governor of the Colony, in the name and on behalf of Her Majesty, granted the site to Dr. Gray the Bishop of Cape Town and his successors in the see, "on condition that the land hereby granted shall for ever hereafter be used for ecclesiastical purposes in connection with the Church of England, and to and for no other purpose whatsoever. . . . Subject however to all such duties and regulations as are either already or shall in future be established with regard to such lands." The site is described as a piece of land on which the St. George's Church has been erected.

It does not appear that any duties or regulations had been

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established except those which were established by the Ordinance of 1839, nor would there seem to be any mode of establishing any future duties or regulations except by some legislative or judicial authority.

With reference to the expression "ecclesiastical purposes in connection with the Church of England," it is to be observed that the bishopric of Cape Town was founded in the year 1847, at which time, as is stated in the judgment in *Long* v. *Bishop of Cape Town*, the legislative authority over the colony was vested in the Crown. Bishop Gray was appointed by Her Majesty, and ordained and consecrated by the Archbishop of Canterbury, having first taken the oath of allegiance, the oath affirming the Queen's supremacy, and the oath of obedience to the archbishop as metropolitan.

When the grant of 1849 was made the see of Cape Town included Graham's Town. But in the year 1853 Dr. Gray resigned his bishopric in order that his diocese might be contracted in extent, and that two new dioceses, those of Graham's Town and Natal, might be erected.

On the 8th of December, 1853, the Crown issued letters patent assigning to Bishop Gray the new diocese of Cape Town, and appointing him to be Metropolitan Bishop in the Colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena.

On the 20th of December, 1853, the Crown issued letters patent erecting the bishopric of Graham's Town, and ordering the consecration of Dr. Armstrong as first bishop of that diocese. The bishop and his successors were made a body corporate. Graham's Town was erected into a city and the see of the bishop. And it was declared "that the church called St. George, in the said city of Graham's Town, shall henceforth be the cathedral church and see of the said John Armstrong and his successors bishops of Graham's Town." But the bishop was left at liberty to constitute any other church at Graham's Town to be his cathedral and see. The bishop had power granted to him to found dignities in his cathedral and archdeaconries in his diocese. By the bishop's successors were meant persons named and appointed by the Crown, and ordained and consecrated by the Archbishop of Canterbury.

Some time previously to the issuing of these letters patent the Crown had granted a constitution to the colony, and a representative colonial legislature had been established.

On the 20th of November, 1857, the Crown issued letters patent appointing the Rev. Henry Cotterill to be Bishop of Graham's Town in the place of Bishop Armstrong, who was then dead, and directing the Archbishop of Canterbury to consecrate him. The provisions of this instrument which relate to the church of St. George, to the power of the bishop to constitute dignitaries, and to the nature of the bishop's successors, are precisely to the same effect with the corresponding provision in Bishop Armstrong's patent.

On the 17th of July, 1860, an Act of the Colonial Legislature was passed enabling the Bishop of Cape Town to transfer to the Bishop of Graham's Town for the time being and his successors all immoveable property vested in the Bishop of Cape Town but situate in the diocese of Graham's Town, "provided that every such property so transferred shall be subject to the same trusts in all respects after such transfer as it was subject to at the time of such transfer."

By a deed dated the 4th of March, 1863, the Bishop of Cape Town conveyed to Bishop Cotterill and his successors the land conveyed by the grant of the 7th of June, 1849, subject to the conditions in that grant mentioned and referred to.

By a deed dated the 17th of June, 1871, Bishop Cotterill conveyed the same property to himself and three other persons, being apparently the trustees of the Diocesan Trust Board of Graham's Town, to hold upon the trusts upon which the bishop himself held.

There has been some controversy as to the regularity of this conveyance of 1871, but their Lordships hold the question to be immaterial. The interest which was passed first to Bishop Gray, then to Bishop Cotterill, and then to the grantees of 1871, is an interest clothed with no active duties, and subject to the trusts, duties, and regulations created by the Ordinance of 1839 and the conveyance of the 7th of June, 1849. It was not contended at the Bar that the position of such a bare interest as this could affect the questions in this case.

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Such being the legal position of the property in dispute, it is now necessary to shew the position of the disputants, both with reference to one another and with reference to the property.

In the month of February, 1863, Lord Kingsdown delivered the opinion of this Board in a case which threw a new light on the position of the Church of England in South Africa, and shewed that the advisers of the Crown had purported to do what was beyond its power. In the controversy between Bishop Gray of Cape Town and Mr. Long, the Colonial Court held that the letters patent of 1853, being issued after a constitutional government had been established, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the colony. On appeal to Her Majesty in Council that opinion was upheld. Lord Kingsdown then proceeds to discuss the question whether the want of coercive jurisdiction in the bishop had been supplied by the voluntary submission of Mr. Long. He states the position of English churchmen as follows:—

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them.

"It may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice.

"In such cases the tribunals so constituted are not in any sense Courts. They derive no authority from the Crown, they have no power of their own to enforce their sentences, they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision, as they give effect to the

decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

"These are the principles upon which the Courts in this country have always acted in the disputes which have arisen between members of the same religious body, not being members of the Church of England" (1).

In the course of the next year a controversy turning upon the same principles arose between the Bishop of Natal and Bishop Gray claiming to act as his Metropolitan under the patents of 1853. The opinion of this board was delivered by Lord Westbury in December, 1864. As to the power of the Crown the law is thus laid down:—

"We apprehend it to be clear upon principle that after the establishment of an independent Legislature in the settlements of the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its prerogative (for these letters patent were not granted under the provisions of any statute) to establish a metropolitan see or province, or to create an ecclesiastical corporation whose status, rights, and authority the colony could be required to recognise" (2).

And, after giving reasons for this opinion, his Lordship continues,—

"The same reasoning is of course decisive of the question whether any jurisdiction was conferred by the letters patent. . . . It is quite clear that the Crown had no power to confer any jurisdiction or coercive authority upon the Metropolitan over the suffragan bishops, or over any other person."

The question then arose whether the Bishop of Natal had by contract given the jurisdiction claimed by Bishop Gray. On this point Lord Westbury says:—

"Even if the parties intended to enter into any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any such jurisdiction" (3).

One effect of these expositions of the law was that the Crown ceased to grant letters patent for bishops in colonies possessing

(1) 1 Moore, P. C. (N.S.) 461. (2) 3 Moore, P. C. (N.S.) 148.
(3) 3 Moore, P. C. (N.S.) 155.

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independent Legislatures. It has been supposed in this case that the Crown might still take such action as to give to Graham's Town a bishop who should be a successor to Bishops Armstrong and Cotterill, within the terms of the patent creating the bishopric. But though the Crown has not in any formal or public way decided not to resume the practice prevailing prior to 1863, their Lordships are clear that this case must be decided on the footing that the practice no longer exists.

Another effect of the decisions was that English churchmen in the colonies took steps to organize themselves, like other independent religious societies, on the footing of contract. This was done in South Africa by the action of synods, the effects of which will be presently discussed.

In the year 1865, the defendant, who was then the vicar of Ashton-under-Lyne, agreed with Bishop Cotterill, who was in England, that he should accept the office of colonial chaplain at Graham's Town, and should also be appointed Dean of Graham's Town. He was accordingly appointed to be colonial chaplain by letter from the Secretary of State, and he went to the colony in November, 1865. He had before leaving England, signed declarations of obedience to the Bishop of Graham's Town and his successors, and of submission to the rules and regulations of the synod of the diocese of Graham's Town, in all things not contrary to the laws of the United Church of England and Ireland. And he also subscribed to the three articles required to be subscribed by the 36th of the Canons of 1603.

On his arrival in the colony, he found that the vestry were in possession of the church of St. George, as according to the Ordinance of 1839 they ought to have been. They appear to have accepted the colonial chaplain to be their officiating minister as a matter of course, according to the usual practice, and they put the defendant into possession of the church by handing him the keys, which are the symbols of possession. This, he says, was done under the Ordinance of 1839, by the provisions of which St. George's Church has always been governed. With a natural fondness for terms which bring the familiar system of the mother country before the mind, he calls this proceeding an induction of himself as rector.

Two or three months afterwards, Bishop Cotterill returned to the colony, and he then appointed the defendant to be Dean of Graham's Town, and installed him in the church as such. So far as the dignity goes, the bishop may have had power under his patent to create it, but he could not confer any authority with it except such as might flow from contracts between the defendant and others. In this case there were no special statutes for the cathedral, nor have any been made till after the present dispute began.

It is important not to be misled by the false analogies of English ecclesiastical titles. The defendant is a titular dean, and may be called a rector. But in point of law, and for the present purpose, he must be taken as the officiating minister of a church governed by the Ordinance of 1839, and the grant of 1849, and appointed thereto either by the vestry, or by the Crown, or by the joint action of the two. Neither the vestry nor the Crown have been made parties to this suit. If it were necessary to determine the precise origin of the Defendant's title, their Lordships would have to deal with the difficulty as to the frame of suit which has been indicated by the Chief Justice, and on which Mr. Justice Smith bases his judgment.

In the years 1867 and 1869, synods were held for the diocese of Graham's Town. In the year 1870 was held the first provincial synod of the Church of South Africa. By these synods much was done to establish that Church on a voluntary basis. It is sufficient for the present to say of them that the defendant took an active and leading part in the proceedings.

In the year 1871, Bishop Cotterill resigned his office, and, as no appointment of a successor by letters patent could be looked for, Bishop Gray, as Metropolitan, issued a mandate addressed to to the defendant commanding an election of a new bishop. The result was the election of the plaintiff, and in that election the defendant took the leading part.

Some time afterwards, the defendant became dissatisfied with the proceedings of the synod, but he did not withdraw from his position in the Church of South Africa. When the present dispute began, the defendant did not contend that the plaintiff had not the ecclesiastical character which he claimed to have. On

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the contrary, the defendant insisted on his own rights as dean, which, as he asserted quite erroneously, would, according to English ecclesiastical law, give him the right of excluding the bishop from ministrations in the cathedral. It is only during this litigation that the defendant has contended either that he himself is not a member of the Church of South Africa, or that the plaintiff is not the successor of Bishop Cotterill, or that the plaintiff and his church are disconnected with the Church of England.

Their Lordships consider that the Defendant's present contention is wholly inconsistent with his past conduct. The Chief Justice says on this point:—

"It is idle for the defendant to deny that he joined the Church of South Africa, and became personally subject to its constitutions and canons, in the face of the part which he took in the discussions of the provincial synod of 1870, and in the absence of any protest against the separatist canons adopted by that synod. It is still more idle for him to deny that he has subjected himself personally to the episcopal jurisdiction of the plaintiff according to the laws of the Church of South Africa, in the face of the documentary proof which exists of his active participation in the election of the plaintiff."

Of the same opinion was Mr. Justice Smith, and with it their Lordships entirely agree.

So far then as this dispute turns on the question whether the defendant has come under personal contracts or equities, the plaintiff has proved his case. But the defendant cannot contract away the rights of other people. If he is occupying an office in which he owes duties to the Government, to the vestry, or to the church members, he cannot by his contract give to any extraneous person or body rights which may interfere with those duties. If again the plaintiff belongs to a religious body which cannot claim to be in connection with the Church of England as by law established, no contract with the defendant, or with any one else, can give him a right to use property which is settled to uses in connection with that Church. Their Lordships will address themselves to this latter question, which they think must govern the

case. For that purpose they have to examine the acts of the synods, which are set forth in this record.

In conducting this examination, their Lordships do not enter into the discussions whether or no the Church of South Africa is a branch of or identical with the Church of England. What the charters of the endowment now in question require, is connection with the Church of England as by law established; and on this part of the case it is sufficient for the plaintiff if he can shew such a connection on the part of the Church of South Africa.

One thing which their Lordships conceive to be necessary for establishing such a connection between the Church of England and another Church is a substantial identity in their standards of faith and doctrine. Where the other Church is that of a colony possessing an independent Legislature, there must be differences, as for instance, in the appointment of bishops and in the erection of Courts, such as necessarily result from the difference of political circumstances in which the Church of England and the other Church find themselves placed. There may probably be other differences, which yet might be too slight to work a disconnection, and which need not now be considered.

Among the Acts of the Synod of 1870 there are several provisions which in the Supreme Court and here have been relied on to shew a disconnection between the Church of South Africa and the Church of England, and which their Lordships will not now discuss in detail. Such are the provisions of the 27th canon, the declarations which refer to a possible alteration of the creeds, and to a possible alteration of formularies by a general assembly, the provision in the 3rd canon for the election of bishops without the consent of the Crown, and the constitution of separate Ecclesiastical Courts. Their Lordships are not prepared to say that the effect of these provisions is to disconnect the Church of South Africa from the Church of England. The most important in this respect are the two last mentioned provisions. But they are the necessary results of the legal and political situation as laid down by Her Majesty in Council, not the expression of any separatist intention. If they worked a disconnection, there would be an absolute impossibility of connection between two Churches so situated. And it appears to their Lordships that, though the

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existence of separate systems of appointing bishops and of ecclesiastical tribunals is likely enough in the course of time to lead to divergencies, the mere fact of their establishment does not produce any such effect.

It is the 1st article of the Constitution, and especially the 3rd proviso attached to it, which, in their Lordships' opinion, creates the great difficulty in the way of holding that the Church of South Africa is in connection with the Church of England. That article is as follows:—

"*Articles of the Constitution.*

"1. The Church of the Province of South Africa receives the doctrine, sacraments, and discipline of Christ, as the same are contained and commanded in Holy Scripture according as the Church of England has received and set forth the same in its standards of faith and doctrine, and it receives the Book of Common Prayer, and of ordering of bishops, priests, and deacons, to be used according to the form therein prescribed in public prayer and administration of the sacrament and other holy offices, and it accepts the English version of the Holy Scriptures as appointed to be read in churches, and further it disclaims for itself the right of altering any of the aforesaid standards of faith and doctrine.

"Provided that nothing herein contained shall prevent the Church of this province from accepting, if it shall so determine, any alterations in the formularies of the Church (other than the creeds) which may be adopted by the Church of England, or allowed by any general synod, council, congress, or other assembly of the Churches of the Anglican Communion, or from making at any time such adaptations and abridgments of and additions to the services of the Church as may be required by the circumstances of this province.

"Provided that all changes in and additions to the services of the Church made by the Church of this province shall be liable to revision by any synod of the Anglican Communion to which this province shall be invited to send representatives.

"*Provided also, that in the interpretation of the aforesaid standards and formularies the Church of this province be not held to be bound by decisions in questions of faith and doctrine*

or in questions of discipline relating to faith and doctrine other than those of its own ecclesiastical tribunals, or of such other tribunal as may be accepted by the provincial synod as a tribunal of appeal."

There are in this article and in other parts of the synodical proceedings general expressions affirming in the strongest way the connection of the Church of South Africa with the Church of England, and its adherence to the faith and doctrine of the Church of England. But all these general expressions are unavailing for the present purpose, if on coming to particulars we find that the constitution substantially excludes portions of the faith and doctrine of the Church of England. The trusts of the property in dispute are declared by the Ordinance of 1839, and the grant of June, 1849, in favour of persons belonging to the United Church of England and Ireland as by law established. But the standards of faith and doctrine adopted by that Church are not to be found only in the texts. They are to be found also in the interpretation which those texts have from time to time received at the hands of the tribunals by law appointed to declare and administer the law of the Church.

It has been argued that the Church of South Africa has here done all that existing political circumstances permitted it to do for continued connection with the Church of England; and again, that the proviso is a mere statement of the facts of the case, and means no more than this: that as the Church of South Africa must have tribunals of its own, it hereby places on record that their decisions should be binding.

The necessity of separate tribunals and its probable consequences has been above dealt with. But their Lordships consider that the proviso under consideration is very much more than a recognition of the facts of the case; and that the Church of South Africa, so far from having done all in its power to maintain the connection, has taken occasion to declare emphatically that at this point the connection is not maintained.

It was competent to the Church of South Africa to establish for itself any system of law which it thought fit. The facts of the case did not compel it to say that its tribunals shall not take English decisions as authoritative. It might have declared

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that the decisions of the tribunals established by law for the Church of England, whether past or future, should be binding on the tribunals of the Church of South Africa. That would probably keep the two Churches in connection for the longest period of time, though it would not be necessary to go so far in order to maintain the connection at the outset.

But the obvious course for a Church which desired to be in connection with the Church of England to all intents and purposes would be at least to say at starting that its faith, doctrine, and discipline should be those which then prevailed in the Church of England. Such a Church would, until some fresh departure occurred, be in connection with the Church of England.

Their Lordships were strongly invited by the respondent's counsel to connect the proviso under consideration with the course of some well-known controversies. There is no judicial ground for saying that it was aimed at any special practice or doctrine. But its practical effect may well be illustrated by reference to some important decisions of Her Majesty in Council. For instance, the decisions in the cases of *Gorham* v. *Bishop of Exeter* (1) and *Williams* v. *Bishop of Salisbury* (2), both delivered prior to the Synod of 1870, affirm and secure the right of a clergyman of the Church of England to preach freely the doctrines which were there in question; but in the Church of South Africa a clergyman preaching the same doctrines may find himself presented for, and found guilty of, heresy. Such a reservation on the part of the Church of South Africa must tend to silence and to exclude those whom the decisions of Her Majesty in Council would protect in the Church of England.

The decisions referred to form part of the constitution of the Church of England as by law established, and the Church and the tribunals which administer its laws are bound by them. That is not the case as regards the Church of South Africa. The decisions are no part of the constitution of that Church, but are expressly excluded from it. There is not the identity in standards of faith and doctrine which appears to their Lordships necessary to establish the connection required by the trusts on which the Church of St. George is settled. There are different standards

(1) Moore's Rep. (Ed. 1852.) (2) 2 Mooro's P. C. (N.S.) 375.

on important points. In England the standard is the formularies of the Church as judicially interpreted. In South Africa it is the formularies as they may be construed without the interpretation.

It is argued that the divergence made by the Church of South Africa is only potential and not actual, and that we have no right to speculate on its effect until the tribunals of South Africa have shewn whether they will agree or disagree with those of England. Their Lordships think that the divergence is present and actual. It is the agreement of the two Churches which is potential. The ecclesiastical tribunals of South Africa may possibly decide in all important points as Her Majesty in Council has done. But the question is whether they have the same standard; and, as has been shewn, they have a different standard.

Of course it was perfectly competent to the Church of South Africa to take up its own independent position with reference to the decisions of the tribunals of the Church of England. But, having chosen that independence, they cannot also claim as of right the benefit of endowments settled to uses in connection with the Church of England as by law established.

Such being their Lordships' view of the synodical proceedings in 1870, it is not necessary to consider further whether the defendant's position is such as to enable him by his conduct to give to the plaintiff the rights he claims, or whether the suit is so constituted as to enable the plaintiff to obtain any decree for the enjoyment of property situated as this is. It will have been seen by the foregoing observations that there is difficulty on both these points.

Their Lordships wish to add their opinion that Courts of Law cannot settle in any satisfactory way questions affecting permanent endowments after a total change of circumstances has occurred, and their concurrence with the Chief Justice in thinking that the Legislature alone can properly deal with such cases.

The result is that their Lordships will humbly advise Her Majesty to dismiss this appeal. The costs must follow the result.

Solicitors for the appellant: *Moore & Currey.*
Solicitors for the respondent: *Venning, Sons, & Mannings.*

[PRIVY COUNCIL.]

J. C.* 1882 May 9, 10.

CHINA MERCHANTS' STEAM NAVIGATION COMPANY. . . . . } PLAINTIFF;

AND

W. L. BIGNOLD . . . . . DEFENDANT.

AND CROSS APPEAL.

THE "HOCHUNG." THE "LAPWING."

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

Collision—Apportionment of Damage—Infringement of the Rule with respect to Lights—Merchant Shipping Act, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

Where two ships incurred damage in a collision and it was found that one of them was to blame for improper navigation, and that the other had infringed the regulations with respect to lights:—

Held, that in the absence of proof that such infringement could not possibly have contributed to the collision, the damage must be divided according to the ordinary rule of the Court of Admiralty.

The *Fanny M. Carvill* (1) approved.

APPEAL from two judgments of the Supreme Court (July 28, 1881) dismissing two cross petitions. The circumstances of the case are stated in the judgment of their Lordships.

Butt, Q.C., *Cohen*, Q.C., and *Masterman*, for the appellant company.

Dr. *Deane*, Q.C., *A. Staveley Hill*, and *Stokes*, for the respondent *Bignold*.

[The cases cited were *The Khedive* (2); Marsden on the Law of Collisions at Sea, p. 14; *The Fanny M. Carvill* (1); *The Hibernia* (3), *The Ann* (4); *The East Lothian* (5); *The Haswell* (6); *The Rosita* (7); *The North American* (8).]

* *Present*:—SIR ROBERT J. PHILLIMORE, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

(1) Aspinall's Maritime Cases (N.S.) vol. 2, p. 569.
(2) 5 App. Cas. 876.
(3) Aspinall's Maritime Cases (N.S.) vol. 2, p. 454.
(4) 1 Lush. 55.
(5) Lush. 241.
(6) Br. & Lush. 247.
(7) Law Rep. 2 P. C. 214.
(8) Swabey, 358.

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1882
CHINA MERCHANTS' STEAM NAVIGATION COMPANY v. BIGSOLD.
THE "HOCHUNG." THE "LAPWING."

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is a case of a collision between the *Hochung*, a steamer belonging to the China Merchants' Steam Navigation Company, and Her Majesty's Gunboat *Lapwing*, which happened on the 17th of April, 1881, about 10.30 p.m., twelve miles off Ocksen Island, on the coast of China. The weather seems to have been calm; there was very little wind. Cross suits have been instituted by the Steam Navigation Company and by the lieutenant of the *Lapwing*, who has been substituted for the commander, who is unfortunately dead.

The cases of the two vessels may be very shortly stated. They were steering in almost opposite courses, so as to be nearly meeting vessels, there being but a point or a point and a half's difference between their courses. The *Lapwing* represents herself to have been steering S.W. by W. ½ W.; the *Hochung*, N.E. by E. ½ E. The case of the *Hochung* is in substance this: That she first saw, at a distance of two or three miles, the *Lapwing* as a dark object in the water, having no lights of any description, on her starboard bow, and that the *Lapwing* continued on her starboard bow; and that being so, the *Hochung*, supposing that the *Lapwing* was going to pass to starboard, starboarded her helm, and by that means turned to the northward; and that the collision occurred in consequence of the *Lapwing* porting her helm and thus meeting the *Hochung*.

The case of the *Lapwing* is, that the two vessels were nearly meeting each other, their courses being divergent by only a point or a point and a half, and that they were port bow to port bow; that the commander of the *Lapwing* kept his course for a considerable time, when he ported his helm, in order to give the *Hochung* a wider berth: that the *Hochung*, instead of continuing her course or porting (in either of which cases there would have been no collision), starboarded her helm, and thereby came right across his bows; and this caused the collision.

These are, in substance, the cases of the two vessels. There is also an allegation, on the part of the *Hochung* that the *Lapwing* had no proper lights according to the regulations, and there is a

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denial of this on the part of the *Lapwing*. The learned judge found both vessels to blame. He adopted the version of the *Lapwing* as to the relative position of the vessels, and as to the duty of each to steer her course under the circumstances, and he found that the *Hochung* was to blame in that respect. He also found the allegation that proper lights had not been exhibited by the *Lapwing* proved. He therefore found both vessels to be in fault. Their Lordships are sensible of the advantage which the Court below has of hearing and seeing the witnesses, and are not disposed to reverse decisions come to upon oral evidence unless there is very strong reason to suppose that the Court below has come to a wrong conclusion. Their Lordships see no reason to suppose that the Court has come to a wrong conclusion on either of the points which have been indicated.

With respect to the positions and courses of the vessels, their Lordships observe that not only is there a conflict between the witnesses called on behalf of their respective vessels, but that some of the witnesses who are called by the *Hochung* who were on board the *Lapwing*, and who are disposed to give evidence in favour of the *Hochung*, corroborate the statements of the crew and officers of the *Lapwing* with respect to the courses of the two vessels. It is impossible for their Lordships, acting upon their general rules, to reverse a decision supported by such evidence.

With respect to the question of lights, it was admitted by an officer of the *Lapwing* that the principal light—the masthead light of the *Lapwing*—had been hauled down some three or four minutes (it might have been more) before the collision, and was not hoisted up again at the time of the collision; and this is confirmatory of the statement of the captain and crew of the *Hochung* that no light was visible on board the *Lapwing*.

There is also some evidence (whether the learned judge attached great importance to it or not does not distinctly appear) that her port side light was burning somewhat dimly, so that probably it could not be seen at so great a distance as it ought to have been, although unquestionably it was seen some time before the collision.

Their Lordships therefore think that the finding of the learned judge upon the second point, namely, that the *Lapwing* failed to

comply with the regulations with respect to exhibiting lights, was proved.

The question then arises, whether, this being so, the learned judge was right in dismissing both suits; and it becomes necessary to refer to the law bearing upon this subject.

The 17 & 18 Vict. c. 104, s. 298, commonly called the Merchant Shipping Act, enacts as follows:—"If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog-signals, issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steamship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." This enactment for a certain time altered the rule of the Court of Admiralty, that where it appears that both parties in cross suits are to blame, the damage shall be apportioned between them. But the rule was restored by the 25 & 26 Vict. c. 63, which repealed the section last quoted, and enacted (sect. 29) that, "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary." In the absence therefore of any enactment to the effect that the plaintiff shall not be entitled to recover any recompense, the ordinary rule of the Admiralty became again applicable to cases of collision where both parties were to blame. A more recent statute, the 36 & 37 Vict. c. 85, s. 17, further enacts that—"If in any case of collision it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the

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ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." This enactment renders it unnecessary for the plaintiff to prove that the collision was occasioned by the non-observance of the regulations; he proves default on the part of the defendant by merely shewing that the regulations have been infringed.

This latter section has received interpretation from this Board in several cases. It may be enough to refer to the case of *The Hibernia* (1). In this case, decided on the terms of the last statute, it was held that a ship not exhibiting proper lights was in fault, even if the want of lights did not contribute to the collision. This case may be considered as having been qualified to a certain extent by a subsequent case,—*The Fanny M. Carvill* (2)—in which this Board, affirming a decision of Sir Robert Phillimore, expressed itself in these terms: "There remain, however, two other possible constructions. The first is, that on proof of an infringement of any of the regulations for preventing collisions, there arises, subject only to the qualification contained in the final clause of the section, an absolute presumption of culpability against the vessel guilty of such infringement, to which the Court is bound to give effect, whatever the nature of the infringement may be. The other is, that the infringement must be one having some possible connection with the collision; or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision." And the same doctrine has been laid down by Sir Robert Phillimore in very much the same terms in a subsequent case of *The Englishman* (3).

Applying the law as thus laid down, it appears to their Lordships in this case, that at all events it has not been shewn that the non-compliance by the *Lapwing* with the regulations in respect to lights could not have contributed to the collision. On the contrary, they are inclined to think that, in all probability, it

(1) Aspinall's Maritime Cases (N.S.) vol. 2, p. 454.

(2) Aspinall's Maritime Cases (N.S.) vol. 2, p. 569.

(3) 3 P. D. 18.

did materially contribute to the collision. That being so, the ordinary rule of the Admiralty Court applies as to the division of damage. It has been suggested by one of the learned counsel for the respondents that the learned judge was right in dismissing both suits, or at all events in dismissing the suit of the *Hochung*, on the ground that the proof was not *secundum allegata et probata*; but it appears to their Lordships that there is a sufficient allegation on the part of the *Hochung* that the *Lapwing* infringed the regulations with respect to lights; and, putting aside all the rest of their allegations, that would entitle the owners of that vessel to recover upon the proof of the infringement of the regulation with respect to lights.

The allegations of the *Lapwing* of improper navigation by the *Hochung* are also sufficient, and established. That being so, the ordinary rule of the Court of Admiralty applies; and therefore it will be necessary that the judgment should be varied by directing that, instead of the two petitions being dismissed, the damages should be divided between the parties according to the Admiralty rule, which is that each party shall obtain from the other half of the damage which he has suffered.

Their Lordships will, therefore, advise Her Majesty to vary the judgment in the manner which has been above intimated. Their will be no costs on either side.

Solicitors for company: *Harwood & Stephenson.*
Solicitor for Bignold: *F. Stokes.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1882 July 26.

SHOTTS IRON COMPANY . . . . . APPELLANTS;

INGLIS . . . . . RESPONDENT.

Nuisance—Calcining—Damage to Plantation—Interdict—Distance fixed.

The Shotts Iron Company possess valuable mining leases of the iron ore under the estate of, inter alia, Penicuik, under the condition, not to calcine within a certain area. They calcined beyond this area, but near to the boundary of the lands of Glencorse. The calcining was carried on in open bings eight feet high.

The proprietor of Glencorse on the ground, inter alia, that his ornamental plantations were being destroyed by the fumes from the bings, raised an action concluding for interdict against the company calcining within two miles of his estate:—

Held, affirming the decision of the Court below—but altering the terms of the interlocutor pronounced—that, the Glencorse plantations had been injured by the calcining, and that the pursuer was entitled to interdict to prevent the company from carrying on their calcining within one mile of his lands, in the same manner hitherto pursued by them, or in any other manner whereby noxious vapours may be caused to pass over the pursuer's lands, or any part thereof, to the damage or injury of his plantations or estate.

APPEAL from the Second Division of the Court of Session, Scotland.

The Shotts Iron Company possess valuable mineral mines, by different leases, on the estates of Penicuik, Dryden, and Loganbank, in the county of Midlothian. The minerals consist of ironstone, most difficult to carry, composed partly of iron and partly of coaly matter. In order to get rid of the coaly matter it is burnt in heaps, called bings, about eight feet high, and containing many hundred tons. The estate of Penicuik adjoins the lands of Glencorse, House of Muir and Bellwood, the properties of the respondent, the Right Hon. John Inglis. Under the Penicuik leases the company were taken bound not to carry on any of the operations on any part of lands coloured brown on a map signed as relative to the lease; or within a less distance than 150 yards of any of the feus granted on the estate, or of any dwelling-house or farmsteading. By these restrictions, they are

prohibited from calcining on more than one half of the whole area which the lease covers, namely, an area of three miles, measuring from the pursuer's boundary. But the portion they are not barred from calcining on extends to more than a mile from the pursuer's property. By the Dryden leases they were restricted from calcining on the lands of Dryden, or within 200 yards of the march of Dryden or Mountmarle. Under the Loganbank lease it was specially declared that the company should not be entitled to sink pits, or to carry on any surface operations at all, but should be bound to work the minerals from pits sunk on the adjoining land only. The place where ironstone was brought to the surface, and where the calcining was carried on, was a narrow strip of the Penicuik estate 300 yards wide, running between Glencorse, Belwood, and another estate called Beeslack. After spending a large sum in works, the company commenced their first calcining on the 13th of March, 1877, and continued it until the 8th of April, at a spot called Incline No. 1, within 200 yards of Glencorse. The company having prepared other bings the respondent in November, 1877, commenced an action of suspension and interdict, on the ground that in the operation of burning or calcining considerable quantities of sulphuric acid gas are given off which are converted into sulphuric acid, which were not only injurious to him and others living in the neighbourhood, but also injurious to his woods and plantations, and his plantations had suffered damage by the said operations. Interim interdict was granted, and the Shotts Company lodged answers. On the 27th of November the note was passed, and the interim interdict continued and a record made up. After proof was taken the company lodged a note, undertaking to confine the burning to the winter months, November, December, and January. Upon this the complainer lodged a minute in which, in respect of the above-named minute, he stated that he no longer pressed for interdict, but reserving all claims of damages on account of injury already occasioned, or which may yet be occasioned, to his property through the calcining operations; and he also reserved his right to apply for interdict against the company calcining during the winter months should the calcining

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become a nuisance. On the 12th of March, 1878, the Lord Ordinary pronounced an interlocutor by which, in respect that the complainer did not now press for interdict, he recalled the interim interdict, and found it unnecessary to pronounce any decree on the merits. The company continued thereafter to calcine at Incline No. 1; at Incline No. 2, a place distant 747 yards from Glencorse; and at a place called the new hearths 920 yards from Glencorse, though nearer to Bellwood.

During the years 1878, 1879, and 1880, the calcining was carried on at all three places during the months of November, December, and January, except at No. 2 Incline, where the burning was commenced on the 3rd of January, 1880, and ended on the 11th of March.

On the 30th of October, 1880, the proprietor of Glencorse raised the present action for declaration that the Shotts Iron Company had illegally calcined ironstone to his nuisance, and for interdict against the appellants calcining iron ore or burning blaes on any part of the lands of Penicuik within two miles of his estates.

In his condescendence he alleged that prior to 1877, the trees on his estate were remarkably thriving; that the first appearance of injury to the plantations was then perceived, and had gone on increasing; and that unless the calcining was stopped the whole of the trees in his plantations would be more or less quickly destroyed, and the amenity of his estate as a residential property entirely sacrificed.

The Shotts Iron Company in their defences denied that the injury was caused by calcining. They stated that the leases they hold are for long periods; that the minerals were of great value, and would not be exhausted for a long period of years; that there have been for many years manufactories, particularly large paper-mills, in and about Penicuik, some of which are in close proximity to the respondent's property of Glencorse, smoke and other emanations proceeding from these works over the respondent's property. Since 1864, the appellants have been developing the mineral fields of Penicuik; and during that period have spent large sums in boring and sinking, and in erecting

engine-houses, houses for workmen, in arranging for water supply and drainage, &c. And although the respondent was aware, that these operations would necessarily result in the calcining of large quantities of ironstone in the vicinity of his property, no complaint was ever made until 1877.

The respondent's plea in law was "The pursuer is entitled to decree of declarator and interdict as craved, in respect that the operations complained of are wrongful, illegal, and are to the nuisance of the pursuer."

The pleas in law for the appellants were, inter alia:—

"(2.) The operations complained of being lawful, the defenders should be assoilzied. (4.) The operations complained of not being to the nuisance of the pursuer, the defenders should be assoilzied. (5.) The pursuer does not suffer and has not sustained damage entitling him to any of the decrees concluded for. (6.) Separatim; no ground is alleged or exists for the delineation of two miles libelled, and the prohibition thus concluded for is uncalled for and unnecessary."

In the proof adduced, which was very voluminous and very conflicting, the pursuer, besides the evidence of scientific men, produced a large number of witnesses of practical acquirements, such as foresters, nurserymen, and agriculturists.

The foresters examined stated that since 1877 the appearance and growth of the trees had fallen off. The symptoms of the disease in the trees being clearly traceable to the effect of sulphurous fumes from the bings. Witnesses from a distance spoke to the effect of similar fumes in other parts of the country, and that what was complained of here was, according to their experience, the result of calcining.

The appellants produced a great mass of evidence in support of their contention that the condition of the trees was due to overcrowding, want of drainage, bad soil, and planting under deciduous trees, especially beeches; though they were unable to produce any evidence of the state of the plantations before 1877. And they relied strongly on the fact that trees nearest of all to the bings are quite healthy. While, on the other hand,

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the symptoms of disease which were founded on were observed in abundance at places a great distance from the bings.

The ore which the appellants calcined contains about one per cent. of combustible sulphur. This sulphur when mixed with an equal quantity of oxygen, becomes sulphurous acid, which again, after absorption of another atom of oxygen, forms sulphuric acid. The appellants alleged that during the process of calcining three-fourths of the one per cent. of sulphur remains in the calcined ore, so that only one-fourth of the one per cent. of sulphur is given off into the air, and of that quantity the greater portion is neutralized by the ammonia yielded by the nitrogen in the ore. Whereas the coal of London contains the same amount, one per cent. of sulphur, almost all of which is given off in the form of sulphurous acid during the burning of the coal.

The respondent had smoke observers at work during the years 1877, 1878, 1879, whose evidence clearly proved that the smoke reached the plantation, the prevailing winds being in that direction. They said that the smoke was to be observed at a great distance, extending over a mile from the bings, and that on calm days it lay in the woods.

Among the scientific witnesses for the respondent, Dr. Dewar and Dr. Dittman stated that the injury was caused by sulphurous fumes. They made several experiments to support their view. One, the rain test, consisted in placing bottles so as to catch the vertical rainfall in selected places at different distances from the bings, and in making a monthly collection of the water caught, and in analysing the water for acid, and then comparing the result for the periods during which the bings were burning, with the result of those during which the bings were not burning.

Dr. Dittmar said:

I carefully analysed each separate monthly collection at the six different stations. The method of analysis was by evaporation and precipitation with chloride of barium. In each case I made a blank experiment to detect any possible trace of sulphates which might be present in the re-agent.

I shall now proceed to give the results of the analyses I made of the water collected at the close of the different monthly periods and at the different stations, stating the proportion of sulphuric acid, SO^3, by so many parts per million by weight of the water. When I give five, for instance, that means that one million

parts by weight of the water contains sulphur equal to five parts by weight of sulphuric acid.

Collection for month ending:	Station No. 1.	Station No. 2.	Station No. 3.	Station No. 4.	Station No. 5.	Station No. 6.
30th Oct. 1878,	5·0	5·1	2·2	2·75	3·0	2·6
21st Dec. „	5·9	6·7	7·4	3·6	1·8	7·7
3rd Feb. 1879,	26·6	26·9	14·3	21·1	8·0	10·2
15th June „	5·4	5·5	5·4	4·3	4·9	5·8
20th Dec. „	No water came to the laboratory.	5·2	5·8	7·2	9·0	7·9
10th Feb. 1880,	14·8	25·8	27·8	21·8	9·2	17·8
22nd Mar. „	8·5	11·5	7·6	11·0	5·8	7·1
28th Apr. „	5·2	8·2	5·5	4·4	3·6	4·4
29th Nov. „	9·8	6·9	3·2	6·5	5·3	4·5
1st Jan. 1881,	11·8	9·4	8·2	8·3	5·9	5·3
2nd Feb. „	13·6	12·6	9·9	11·0	7·3	14·8

I have the analyses of a number of rain-waters which were collected on special occasions,—on occasions when we were likely to find a deal of sulphurous acid in the water. In the case of contamination of the air by sulphurous acid, it comes in gusts and blows, and it was quite right to try and catch such moments. In 1880, from the 1st of January to the 1st of February, the rain water was collected near the greenhouse in the forester's garden, and it was found to contain 110 part by weight of sulphuric acid in the million parts of water, which is an immense quantity of acid. That water was collected, not by me or by my assistant, but by Harley, the forester, under my directions. He also collected the water as it ran off a birch tree in the south corner of Sergeant Croft during the night between the 30th and 31st of January, 1880, and I found it to contain 89 parts per million. Then at Lawrence Law on the 1st of December, 1880, between 11 A.M. and 2 P.M., the rain was collected by the forester, my assistant being also present, and it was found to contain 23·8 parts per million.

Cross-examined.—*Q.* Does your analysis enable you to say that you found in those samples five parts per million of free sulphuric acid?—*A.* Yes; because it could not be anything else. If it was not free sulphuric acid, what could it be. *Q.* Did you find five parts per million of free sulphuric acid? *A.* Yes. *Q.* The parts which you found were not in combination with anything?—*A.* The only qualification I must admit is, that part of that small proportion of sulphuric acid may have been in combination with atmospheric ammonia. I did not think it worth while determining that. *Q.* Did you think it immaterial to find out whether the sulphuric acid was free or in combination with ammonia?—*A.* In these circumstances. *Q.* Is there any difference in the effect of free sulphuric acid upon vegetation as compared with sulphuric acid in combination?—*A.* Certainly there must be. The sulphate is innocuous, while the sulphur will do a great deal of harm. *Q.* Can you not say distinctly whether the five parts were or were not in combination with ammonia?—*A.* I have not made special experiments as to that. *Q.* You did not analyse so as to say whether those parts were or were not in combination with ammonia?—*A.* They could not be. *Q.* Did you analyse for that purpose?—*A.* No. I determined my sulphuric acid, and I am satisfied that every chemist will allow me to put down that sulphuric acid as free sulphuric acid. *Q.* Did you find any in combination with lime?—*A.* Decidedly

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not. *Q.* From your analysis can you say that the parts you mentioned were not in combination with lime?—*A.* I can speak more positively as to that, because it is impossible; you might as well ask if it was present as sulphate of lithia, or sulphate of silver; it is something intrinsically impossible. *Q.* But it may have been there as sulphate of ammonia?—*A.* To a very slight extent, always assuming that rain-water is rain-water; if somebody put lime into it, that would make a difference. I cannot tell what number of parts per million of free sulphuric acid are absolutely fatal to vegetable life. *Q.* Do I understand you to say that your experiments shew that you found a considerable quantity of sulphuric acid in the rain-water when the bings were not burning?—*A.* A small quantity of sulphuric acid, and that might be sulphate of ammonia. The highest number of parts per million in the rain-water when the bings were not burning was 11, but that was an isolated case. I attributed that to the burning of coal fires. I do not know whether it would be possible for vegetation to exist with water falling upon it as rain containing eleven parts of free sulphuric acid. Five parts per million was about a fair average.

Professor Dewar said:

The sulphuric acid was in combination by the time we examined it by the rain-water test. As it was passing through the air, it was impossible that it could be in the form of sulphate of lime or sulphate of ammonia; because, first of all, sulphate of lime is not a volatile thing; and, secondly, ammonia is not produced in iron burning—it is a combustible thing itself. The quantity of ammonia present in such a place as Glencorse would be extremely small,—just the ordinary quantity. *Q.* Supposing any quantity that would be present there did combine with a corresponding quantity of the sulphuric acid, would that materially diminish the quantity of sulphuric acid which would remain free?—*A.* It would. *Q.* Would it take much away from it?—*A.* No, if you put it as to the amount of ammonia that would be there. *Q.* And, therefore, a great part of the quantities which you have described, as in the winter months particularly, must necessarily have been free?—*A.* Yes.

Cross-examined.—*Q.* Would you say, that with such a small quantity as you had it is very difficult to distinguish between free sulphuric acid and acid in combination?—*A.* Which has been combined in the bottle—it is difficult. *Q.* What methods must be adopted for the purpose of distinguishing the free sulphuric acid from the sulphuric acid in combination?—*A.* That was no matter which I discussed in connection with the analysis of these samples, because I knew that the sulphuric acid was all in combination by the time I got it to analyse. It was in combination mainly with soda. I took no steps to distinguish the proportion of free sulphuric acid. The sulphuric acid got very simply into combination with the soda. The bottles were always new bottles, and the water having lain for a month in contact with the new glass has always neutralised the acid. *Q.* Were the parts which you describe per million represented by you as being parts of free sulphuric acid?—*A.* They are in the analysis; they are really free sulphuric acid. In the technical sense they represent the amount of free sulphuric acid. *Q.* You have given us a certain number of parts per million of sulphuric acid; do you represent these parts as being parts of free sulphuric acid?—*A.* They are parts which represent the total amount of sulphuric acid present. That is the

only answer I can give. The object was to determine the total amount of sulphates during the whole period under all possible conditions. *Q.* Is the question which I have put to you as to whether these parts are parts of free sulphuric acid as distinguished from sulphuric acid in combination not susceptible of categorical answer?—*A.* It is not, when the analyses were all intended for the determination of the total amount of sulphuric acid.

Re-examined.—*Q.* You were asked whether the sulphuric acid which you analysed was in combination, and you said it was in combination with soda which had got out of the new bottles; it would not be in combination with soda when flying through the air before it got into the bottles?—*A.* No.; sulphate of soda is not a volatile thing. *Q.* Would that sulphuric acid, before it was stopped by the rain and carried into the bottles, be free or not?—*A.* It was free in the air. That is the material point in the inquiry.

Dr. Dittmar also gave evidence as to other experiments; amongst others that of subjecting for a certain time a number of trees in a greenhouse to fumes containing sulphuric acid in the proportion of five volumes to a million volumes of air. And he stated that the trees were found to be damaged in a similar way to those on the Glencorse estate.

The defender's scientific witness, Professor Odling, said:

The value of the water test depends on the ascertainment whether the sulphur is present as free sulphuric acid or as a sulphate. If in a sample of rain-water you find a largish proportion of sulphuric acid in the combined form, that was no evidence whatever of the presence of free sulphuric acid anywhere; but if you find free acid in the water that is evidence of free acid in the air. To ascertain whether there is free acid in the air capable of doing injury, you must determine whether the sulphuric acid in the water is free from sulphate; and from such a large quantity as here mentioned, he would certainly expect to find free acid in the water, if it were free in the air. And if water was standing in a bottle for a month it was not surprising that sulphate of soda was obtained. If the acid was combined in the form of sulphate of soda in the bottles, the acid must not be considered to be free in the air, for the probability would be that there was ammonia in combination with the acid; any soda taken out of the glass would be combined into sulphate of soda as well by the sulphate of ammonia pre-existing as by the sulphuric acid pre-existing.

Dr. Voelcke, another witness for the defenders, said that supposing in analysing the water a certain quantity of sulphuric acid were found in the rain-water, to make the test of value it would be necessary to ascertain whether the acid was free or in combination. If the sulphuric acid was in the rain-water in the form of a sulphate, that would not indicate that there was anything in the air which would do any damage.

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The appellants' scientific witnesses did not use the water or air test, but analyzed certain samples of healthy and diseased or dead leaves and twigs taken from particular trees on the estate for sulphur, with the result that no greater amount of sulphur was found in dead twigs clearly exposed to the fumes from the hearths, than in twigs and leaves clearly remote from such influences.

The rest of the evidence is sufficiently given in the opinions of the Lords.

On the 18th of March, 1881, the Lord Ordinary (1) pronounced the following interlocutory, "Finds, declares, and decerns in terms of the declaratory conclusions of the libel: further interdicts and prohibits the defenders in all time coming from calcining ironstone, or iron ore, or burning blaes on any part of the lands of Penicuik, within one mile of the pursuer's lands, and decerns."

The appellants having reclaimed against this interlocutor, the Lords of the Second Division (Lord Young dissenting), 5 July, 1881, adhered.

On appeal,

June 15, 20, 22, 23, 26, 27, 29, 30; July 17, 18. *Sir Henry James*, A.G., and *Horace Davey*, Q.C. (with them *Alexander Young*):—

Not disputing that *Hole* v. *Barlow* (2) must now be considered overruled (3), contended for the appellants that the preponderance of proof shewed that all the damage was caused by natural causes, such as overcrowding, bad soil, want of drainage, coupled with exceptionally wet seasons; and that the evidence did not substantiate the allegation that the injury apparent was traceable to the calcining operations. That, if it was proved that there was such material damage as to entitle the pursuer to interdict, it should not be in its present terms, but in English form, restricting them from calcining so as to be a nuisance, that should have been quite sufficient. The interdict was too large in its geographical extent. It was contrary to Scotch practice and prin-

(1) Lord Rutherford Clark.
(2) 4 C. B. (N.S.) 334.
(3) See *Bamford* v. *Turnley*, 31 L. J. (Q.B.) 286; 3 Giff. 690, and *Cavey* v. *Ledbitter*, 3 C. B. (N.S.) 470.

ciple to fix an exact distance; if any distance were fixed it should not be greater than half a mile. Only one witness said he smelt the smoke at 800 yards from the bings, and there was no evidence that any injury was done by the fumes to Flotterstone, a mile away.

If this interdict stood it would be res judicata for ever against the appellants, and under no circumstances can calcining be carried on within a mile, although the pursuer's land may all be built over, and invention may do away with the noxiousness of the fumes.

[They cited *Salvin* v. *North Brancepeth Coal Company* (1); *St. Helen's Smelting Company* v. *Tipping* (2); *Fraser* v. *Cran* (3); *Sir John M'Neill* v. *Scott* (4).]

The Lord Advocate (*J. B. Balfour*, Q.C.), *Sir F. Herschell*, S.G. (with them *Graham Murray*), appeared for the respondent, but were relieved from addressing the House except on the form of the order and the extent to which the interdict should go. They maintained that the evidence shewed that the fumes went as far as Flotterstone, over a mile from the bings, that the smoke went over the estate for more than a mile, and localized itself at that distance, and was noxious, and damage was caused by those fumes. That this was not the first case in which the distance was fixed, for see *Beardmore* v. *Tredwell* (5). They submitted that where the operations have become a nuisance, and where it not suggested that they can be carried on without being a nuisance, the order, in Scotch practice, is simply to stop it.

They commented on *Fraser* v. *Cran* (3); *Burntisland Whale Fishery Company* v. *Trotter* (6).]

Sir *H. James*, A.G., in reply.

The House took time for consideration.

(1) Law Rep. 9 Ch. 705.
(2) 11 H. L. C. 642.
(3) 4 Court Sess. Cas. 4th Series, 794; 5 Court Sess. Cas. 4th Series, 290; 6 Court Sess. Cas. 4th Series, 451.
(4) 4 Court Sess. Cas. 3rd Series, 608.
(5) 31 L. J. (N.S.) (Ch.) 892; 3 Giff. 683.
(6) 9 Court Sess. Cas. 1st Series, 144; affirmed 5 W. & S. 649.

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My Lords, there is, I think, no question of law in this case—the doctrine of *Hole* v. *Barlow* (1) having been overruled in England (2), and having been (in my opinion) rightly rejected, as erroneous in principle, by the majority of the Judges in the Court below.

The question of fact, whether the operations of the appellants have been attended with damage to the plantations of the respondent, is one on which none of your Lordships entertained any doubt after the conclusion of the arguments in support of the appeal, in the course of which the whole evidence in the case was fully read. I agree generally with the estimate of the effect of that evidence formed by the Lord Ordinary and by the Second Division of the Court of Session, and it is, therefore, unnecessary to observe upon it in detail. The conflict, which at first sight seems considerable, is as to matters of opinion rather than matters of fact; and I think the direct evidence, relative to the facts of the actual case, is entitled to much more weight than any inference drawn from what is represented as the effect of operations, more or less similar, in other places.

It is unfortunately much too common, in cases of this kind, for scientific witnesses to differ from each other on points as to which it might have been expected, à priori, that there would be no room for such controversy; and, when these differences do exist, judges or juries must (as in all other cases) decide as well as they can between them. Here it is not, and it cannot be, denied that, by the operations in question, large quantities of sulphurous acid have been, during considerable periods of time, continually discharged into the air, in the form of vapours, noxious in that state, and which (unless neutralized by mixture with ammoniacal vapour, converting them into sulphate of ammonia) must soon have become changed into sulphuric acid, a substance very much more noxious.

It is not disputed that such quantities of sulphuric acid as those indicated by the results of the water test used by the wit-

(1) 4 C. B. (N.S.) 334.

(2) *Bamford* v. *Turnley*, 31 L. J. (Q.B.) 286; *Cavey* v. *Ledbitter*, 3 C. B. (N.S.) 470; *Salvin* v. *Brancepeth Coal Company*, 9 Ch. App. 705.

nesses Dittmar and Dewar (with reference, at all events, to the stations of Sergeant Croft, Mains Park, Pheasant Corner, and Middle Belt, and to the months ending the 3rd of February, 1879, the 10th of February, 1880, the 22nd of March, 1880, the 1st of January, 1881, and the 2nd of February, 1881), would be sufficient to be destructive, or at least, seriously injurious to trees (particularly coniferous trees) at those places, if the acid came into the water in a free state, and not as sulphate of ammonia. I see no reason to doubt that the chemical knowledge of those witnesses was sufficient to enable them to distinguish, without analysis, sulphate of ammonia from sulphate of soda; and if (as the witness Dewar says) the substance actually found in the water was sulphate of soda, it is clear, that the soda could only have been obtained from the glass of the new bottles which were used. I think it is also to be inferred from the evidence that nothing but free sulphuric acid in the water would have extracted that soda from the glass. Mr. Dittmar and Mr. Dewar are both Professors of Chemistry; the one at Glasgow, the other in the University of Cambridge. They express confident opinions, amounting in their own minds to certainty, that no considerable quantity of ammonia could have been in combination with the acid which they found, and that it must have come into the water in a free state.

The scientific witnesses on the other side did not use the rain test at all. Some of them analyzed certain samples of healthy and diseased or dead leaves and twigs taken from particular trees on the estate; but the results of that analysis contribute, in my judgment, nothing really useful towards a solution of the controversy. Two of the most important of those witnesses are Dr. Odling and Mr. Dupré. Dr. Odling stated, that "it is only free sulphuric acid that would be sensible to taste or smell; if the sulphur were in the form of a sulphate it would not be perceptible." Mr. Dupré said, "sulphur would not be sensible to the smell or taste, if it were in combination with ammonia, as sulphate of ammonia. Wherever sulphur could be clearly detected by the senses, it would, no doubt be free." Many of the respondent's witnesses were sensible both of the smell and the taste of sulphur in the smoke issuing from the bings, often at

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considerable distances, and on various parts of the estate. Among others, Milroy the younger distinctly perceived "a strong sulphury smell," whenever he was "in the line of smoke." Mr. Worthington Smith (a scientific botanist), "smelt the fumes and felt the taste in his mouth." Mr. Dewar said, "It was quite perceptible to the mouth and nose of any man who knows what sulphurous acid is, that there was sulphur present and in large quantity."

There is much and trustworthy evidence to the effect that the plantations presented generally a healthy and thriving appearance until the operations in question began in 1877, and that from that time forwards their appearance began to change; that a large number of trees which had previously been (or seemed) healthy, became more or less blasted and diseased, and many died; and that this mischief was progressive, especially in the lines of those winds which (according to the observations made by the witnesses Milroy junior, Bryden, and Harley) most frequently blew the smoke from the bings over the estate.

It was attempted by the appellants to account for all this mischief by natural causes, and to meet the difficulty arising from coincidence of time, by suggesting that the effects of those causes may have been aggravated by the prevalence at that time of unusually wet and cold seasons, and that the trees only then attained that stage of their growth at which such effects would be likely to be developed. I have no doubt that, to some extent, the natural causes suggested by the appellants' witnesses, or some of them, were really in operation in these, as they would probably be in most plantations similarly situated, and planted or managed on a similar system. It is also highly probable that, when to the ordinary operation of such natural causes was superadded the deleterious influence of sulphurous vapours, those trees which, from wet or bad soil, from overcrowding, from want of light and air, or from any other source of disease or decay, were weaker than the rest, might suffer most and soonest. Whatever might be the causes at work, it is perfectly consistent with experience that strong plants would resist them longer and better than weak, and that a noxious vapour or fluid, descending more or less intermittently in a diluted state, might operate upon the

stronger plants only as a slow poison, requiring continuance during a considerable space of time before its effects would become fully manifest. This might well account for much difference in the appearance of neighbouring trees, even of the same kind.

And the fact, also relied upon by the appellants, that some of the trees and plants which withered and died were more distant from the bings than others which did not in like manner suffer (including some hedges and low shrubs very near the incline No. 1), is of much less weight than at first sight it might seem to be, when the variations of atmospheric influences, on which the incidence of the deleterious vapours must always depend, are taken into account. The vapour might not be converted from sulphurous into sulphuric acid until it had travelled some distance; and (as Mr. Dupré, the appellants' witness, said in cross-examination), "the places at which the fumes would alight would, no doubt, vary according to the aerial conditions at the time, within limits; primarily the fumes start upwards; they may, or may not, be earlier or later brought to the ground according to lateral winds and other conditions; and, in certain conditions, portions comparatively near the bing may be less affected than portions further away."

Without dwelling further on the general case, I content myself with adding, that the natural causes alleged by the appellants appear to me to be inadequate to account for the appearances and facts in and subsequent to 1877, described in the evidence of the pursuer and those of his witnesses who were best acquainted with the woods (especially Milroy the elder, and Robertson), and in the tabulated statements verified by Lamont and Slater.

It being, therefore, clear to my mind that the respondent is entitled to an interdict against the continuance of the operations of the appellants, so as to prevent further damage to his plantations and estate, the question which remains is, as to the proper form and extent of that interdict. The Court of Session has prohibited the appellants, "in all time coming, from calcining ironstone or iron ore, or burning blaes, on any part of the lands of Penicuik, within one mile of the pursuer's lands." The appellants object to this as too wide; first, because the prohibition is

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absolute against any calcining at all within that distance, even by processes different from that hitherto adopted by them, and even if, by any alteration or improvement of those processes, all discharge of noxious vapours, capable of doing damage to the plantations of the respondent, might be avoided; and, secondly because they say that the interdict ought to have been general against calcining so as to do damage to the respondent's plantations or estate, without fixing any distance, or, at all events, without fixing so great a distance as one mile.

The first of these objections appears to me to be well founded in principle. The evidence, according to the view which your Lordships take of it, proves that the operations of the appellants, as hitherto carried on by them, have been, and, if continued to be carried on in the same manner, will continue to be injurious to the respondent's estate. The interdict, therefore, may properly prohibit the continuance of those operations in that manner; but I am of opinion that, so far as it goes beyond this, it ought to be qualified, so as only to prohibit any other manner of calcining which may cause noxious vapours to pass over, and occasion damage to the respondent's plantations or estate. The order appealed against ought, therefore, to be varied in that way; but I do not think that such a variation only ought to affect the costs of the appeal.

The more important question is that as to the limitation of distance. There is, I think, no valid objection to fixing a specified distance for the purpose of such an interdict, if it is justified by the evidence. If so justified, it is practically convenient, and may usefully narrow the field of any future controversy between the parties. By the conclusion of the summons it was asked that a limit of two miles should be fixed. The Court below has thought one mile proper; and your Lordships ought not, I think, to reverse the order in that respect, unless you see reason, after fully considering the evidence, to think that it does, or may, unduly restrict the rights of the appellants.

After full consideration of the arguments of the Lord Advocate for the respondent, and of the Attorney-General in reply, I have myself come to the conclusion, that there is sufficient proof of sulphurous fumes, likely to cause damage to the respondent's

plantations, having been carried by certain winds to several parts of the respondent's estate and other places, distant not less than one mile from the bings from which those fumes proceeded; and consequently that the limit of one mile fixed by the Court of Session is justified by the evidence in this case.

That the visible fumes proceeding from the bings have often spread themselves for the distance of a mile or more over parts of the respondent's estate, under the influence of certain winds (some of them of frequent occurrence), is a fact fully established by the observations of Milroy junior, Bryden, and Harley. Those from the incline No. 2, frequently went as far as Glencorse House and church (just over a mile) in November and December, 1878, and in the winter of 1879–1880. Those from the New Hearths were also observed at the same places (the distances being greater) and elsewhere a mile off, in January, 1879, and in the winter of 1879–1880. The only question, therefore, is, whether at that distance they would be innocuous. So long as they retain the form of dense clouds hanging or spreading over the plantations, there seems to be no à priori reason for supposing that they would have undergone such a degree of dilution as to deprive them of all noxious qualities; and it seems certain that whatever free acid remains in suspense at that distance would be sulphuric acid, and not sulphurous. The evidence as to the distance at which the characteristic smell and taste of sulphur was generally perceived is not very definite; but, as far as it goes, it is in the respondent's favour. The appellants insisted that if there had been any serious nuisance felt from these causes at Glencorse House, or Logan Bank, or Bellwood House, there must have been evidence to that effect, and that such evidence as there was is rather to the contrary. To this I agree; but the example of London, where the atmosphere is constantly loaded with vapours unquestionably injurious to the life or health of some trees, and especially of conifers, and where, nevertheless (in ordinary states of the atmosphere), the comfort of human life is not seriously interfered with by those vapours, is enough to shew that substantial mischief might be done, without any sensible nuisance to the inmates of those houses.

Much reliance was placed in the argument on both sides on the

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evidence as to Flotterstone, which I have therefore carefully considered; and the result is that I think it preponderates in the respondent's favour. The middle part of Flotterstone is distant 1160 yards from the incline No. 1, 1530 yards from the incline No. 2, and 1715 yards from the New Hearths. Flotterstone Bridge is 1445 yards from the incline No. 1, 1556 yards from the incline No. 2, and just over one mile from the New Hearths. East Flotterstone is 1350 yards from the incline No. 1, one mile and 160 yards from the incline No. 2, and one mile and 315 yards from the New Hearths. There was calcined at incline No. 1, from the 13th of March to the 28th of April, 1877, a total quantity of 2015 tons of ironstone, and at incline No. 2 from the 14th of March to the 27th of May in the same year, 2624 tons. This was a very much less quantity than at later dates; but the operations during those months extended over part of the spring season, when the trees were putting forth their new shoots and leaves; which did not happen afterwards. In November and December, 1877, 14,014 tons were calcined; all at incline No. 2. The observations of Milroy junior, Bryden, and Harley as to the winds and fumes, did not begin till November, 1878, and those of Dittmar and Dewar, with the rain test, not till October of that year. Mr. Robertson, a nurseryman in Edinburgh, who had known the Glencorse plantations, and had been through them once or twice every summer for twenty years, visited Glencorse on the 24th of November and 14th of December, 1877, and again on the 4th of January, 1878, to ascertain the damage (if any) done to the trees and its cause. He speaks of serious damage at Flotterstone (very much worse he says, on his visit in January, 1878, than in November and December, 1877), of which he describes the appearances, and which he attributes to the fumes which he saw proceeding in "immense quantities of clouds" from the bings at No. 2 incline. It was "very bad at Flotterstone Bank, nearly a mile from where the bing was," that being the farthest point at which he observed traces of injury. The clouds (he says) "first rose in a bluish flame, then they got white, and they lazily crept along through these woods." He did not examine the trees beyond Flotterstone Bank, but he "saw the white clouds" for a greater distance than that—he thought "two miles away."

Milroy, the respondent's forester, first noticed appearances of damage at Flotterstone in 1877, and says that "in some parts just here and there" it was as bad in Flotterstone "as in the woods nearer the bings;" and that he has "sometimes seen the smoke lying in Flotterstone in heavy dead weather, and sometimes going over it." But he adds (and in this he is confirmed by most of the other witnesses) that he has "observed it very very little in Flotterstone since 1877;" and that "the damage has not gone on so badly there as it has done in the other places." The appellants' witness Dunn says that he "found unhealthiness in the Flotterstone Bridge plantations to a considerable extent in 1877, and that the Flotterstone plantations have, in spots, improved since then, and in spots they have not." Another of the appellants' witnesses, Ford, "found the trees at Flotterstone Bridge in 1878, affected in the same way as at other parts of the estate;" and Thompson says the same. No doubt, those three witnesses all consider that the appearances at Flotterstone could not have been due to the smoke from the bings; and, therefore, that they must arisen from natural causes. But their evidence tends to shew that whatever causes of mischief were in operation on other parts of the estate were also in operation at Flotterstone.

Mr. Worthington Smith visited the estate in December, 1878, and again in June, 1879. He says, speaking of the plantation at Flotterstone Bank, that he found the same appearances there in 1878 and 1879, "rather worse" in 1879; and, having also been there two or three times since, he thinks (differing in that respect from most of the other witnesses) that "things have got steadily worse at Flotterstone since then." What is important is, that on one of the days when he was there he "took particular notice of Flotterstone and could smell the fumes there" (which speaking from memory he thinks were coming from the incline No. 2) "and feel the taste in his mouth." He had before spoken of the smell of sulphurous smoke as unmistakeable. The table of the results of the water test given in Mr. Dittmar's evidence shews that, in the month ending the 20th of December, 1879, the water collected at Flotterstone contained 9·0 of sulphuric acid in a million parts by weight of water, being more than the quantity

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(during that month) at any other station: and that in the month ending the 10th of February, 1880, it contained 9·2, though at the other stations in that month it was considerably more. In the former of those months the quantity of ironstone calcined (partly at incline No. 1 and partly at the New Hearths) was greater than in any other month included in these experiments, and at the same time, there was less than the average rainfall, which always affects this test. In the latter month the quantity calcined at No. 1 and the New Hearths was very large. These experiments proved that the noxious acids might be present and precipitated in substantial quantities, even in places where no dense clouds of smoke were at the same time seen. It is admitted that 9·0 of sulphuric acid to a million parts by weight of water is a quantity which, if free in the air, might be injurious to trees, especially to conifers, and that so large a quantity could not be naturally present in the rain or air. The observations of Milroy junior, Bryden, and Harley upon the winds and smoke during the winters of 1878–79, 1879–80, and 1880–81, shew that the smoke from the incline No. 2 lay over the east end of Flotterstone Bank on five days in December, 1878, and one day in January, 1879; that the smoke from the New Hearths did the same on, at least, one day in January, 1879, as did that from the incline No. 1 at Flotterstone Bridge or Flotterstone Bank on one day in November, 1878, and eight days in January, 1879. In the winter of 1879–80 it was six times observed (coming from the incline No. 2) in different parts of Flotterstone; on several days lying "lightly" or "falling lightly" upon the woods, but it was not then observed to come from the New Hearths, nor from incline No. 1. In the winter of 1880–81, Flotterstone is mentioned only once, and on that occasion the smoke came from incline No. 1.

The conclusions as to Flotterstone, which I draw from this evidence as a whole, are, that the spring burning of 1877, limited in amount as it was, was still sufficient to do visible damage there, at least to the spring foilage. The smell and taste, and the water test, proved the presence of sulphuric acid there, in quantities sufficient to be noxious, in 1878, 1879, and 1880. The wind observations of 1878–79, and 1879–80, proved that the smoke frequently lay there, from bings a mile off, in those two

winters, but in a manner perhaps less injurious (in the latter of those seasons) than at other times; and that in 1880–81, it scarcely visited Flotterstone at all, which accounts for the improved appearance of those plantations, which (under any circumstances) were likely to suffer less than such as were nearer to the bings. But that there were noxious vapours, from calcining operations as far distant as a mile, which did from time to time descend upon or otherwise reach Flotterstone, and which were likely to be more or less injurious to the plantations there, according to the direction of the winds and the state of the atmosphere, seems to me to be sufficiently proved.

I am therefore unable to say that the Court of Session has done wrong in prohibiting the continuance of the calcining operations (so far as relates to the manner in which they have hitherto been carried on) within the distance of one mile from the respondent's estate.

I propose to move your Lordships to vary the interlocutor granting the interdict, by adding, after the words "within one mile of the pursuer's lands," the following words, "in the manner hitherto pursued by them, or in any other manner whereby noxious vapour may be caused to pass over the pursuer's lands or any part thereof to the damage or injury of the pursuer's plantations or estate;" and, subject to that variation, to affirm the interlocutor appealed from, and to order the appellants to pay the costs of this appeal.

LORD O'HAGAN:—

My Lords, I do not propose to occupy the time of the House, by discussing at any length the great masses of evidence, on either side, which have already received such ample consideration from your Lordships. I shall only indicate the grounds on which I concur with the opinion just delivered by my noble and learned friend.

The real question is one of fact. The conflict of proof is as great as the issue is important: but we have the judgment of the Lord Ordinary, sustained by that of the Lords of Session, pronouncing in favour of the respondent, as to the existence of an injury to his property, produced more or less by the works of the

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appellants. I say more or less, because Lord Young, who differed in the result from his colleagues, admitted that damage was done to the respondent's plantations by incline No. 1, though he held that there was a failure of proof of such damage by incline No. 2 and New Hearths.

I think that the evidence preponderates strongly in support of the respondent's case, and that the appeal cannot be allowed. As to the existence of injury to the plantation on the estate, the proofs on both sides combine to establish it. They concur in shewing that, in the year 1877 and in subsequent years, substantial damage was done. The controversy is as to the cause of that damage. The appellants say it had its origin in overcrowding and overshading, bad drainage and wet soil, the evil effects of the roots of old trees and the injudicious planting of new ones, the influence of weather, and other things. The respondent asserts, that it was produced by the process of calcination, instituted by the appellants at three several places in the neighbourhood of his property, and blighting his trees to a considerable distance with sulphur fumes, which were fatal, wherever they were present, to the health and verdure of the woods. We have to determine to which of these causes the mischief, which was admittedly accomplished somehow, may justly be ascribed.

To me, the proof as to the comparative condition of things before 1877 and afterwards appears, on this issue, very persuasive for the respondent. Up to that time, it exhibits the trees as having been in a flourishing condition. Till then, there had been no complaint and no ground for any. But in that year the calcination commenced. Contemporaneously with it the condition of the woods was altered for the worse; and thenceforth, at all events, the state of the trees was perceptibly and increasingly deteriorated. The leaves were scorched, the tissues were destroyed, the growth was stunted, and fungi seized upon the roots. The witnesses to the change are beyond impeachment, either as to their means of knowledge or their intentional veracity. The respondent himself and several persons skilled in forestry, who were long familiar with the locality, depose to it, and leave no room for reasonable doubt that at that particular time some evil agency, not before operative, began to alter the condition of the

woods. The argument *post hoc, propter hoc,* is not always a sound one; but if we are satisfied, with the Court below, that the diffusion of sulphurous fumes from the open bings was followed by damage to the plantations falling under their influence, which had enjoyed vigour and health before, the conclusion that they stood to each other in the relation of cause and consequence seems very reasonable.

And it becomes more so when we consider, assuming that the fact of the change is satisfactorily shewn, how inadequate is the theory of the defence to account for it. The operation of the injurious influences on which it relies, such as the injudicious planting and the ill-drained soil, would be comparatively slow, and produce material effects only in a gradual fashion. But the proof represents the injury as having been rapidly created, and soon after the commencement of the calcination; which, on the other hand, must have acted quickly if at all, and made itself manifest, as the respondent says it did, by the injurious effects of the noxious fumes, upon the theretofore healthy trees. I do not think that slowly acting natural causes can reasonably be supposed to have produced the rapid deterioration, even though all allowance be made for the assistance alleged to have been afforded to them by unfavourable weather.

Although the evidence, as in cases like this is usual, is very conflicting, it seems clear enough, that the process of calcination at the open bings necessarily diffused large quantities of sulphurous acid, which were borne to considerable distances, in various directions and at various altitudes, through the respondent's estate from 1877 till 1881. During that period, 144,655 tons are said to have been calcined, two-fifths of which were thrown off in the course of the operation; and we have the uncontradicted statement of Dr. Voelcker (at page 271), that "as near as possible one ton of stone calcined would produce about ten pounds of sulphurous acid." That is, he says, "the proportion that goes into the air, leaving about thirty pounds fixed in the char." Dr. Odling tells us (at page 243), that "in the process the ore is broken and heaped up to a height of about eight feet over an area of about two acres:" so that the large amount of deleterious matter thus launched into the air had the greatest facility afforded for its mischievous

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circulation. Taking the aerial dispersion of the sulphurous acid in such quantities to be undeniable, we have it, I think, quite as well established that its action upon any trees on which it rested must have been very mischievous. "The distinctive marks of acid action upon trees generally," says Dr. Voelcker (p. 261), "manifest themselves in the browning of the tips of the leaves, and, finally, the destruction of the tissue." Some trees resist this poisonous influence of the fumes longer than others, but, wherever they are allowed to operate effectually, the plantations which they affect will probably pine and perish.

And, finally, by the observation of witnesses seemingly quite faithworthy, and as to this, of witnesses on both sides, the injured trees are shewn to have exhibited largely the "distinctive marks" described by the scientific testimony, as belonging to the action of sulphurous acid. In addition, we have the results of the tests applied for the respondent, proving the presence of such acid upon the leaves in various parts of the plantation, and at various distances from the bings, to which the smoke from them had brought it in varying quantities. And, further, in corroboration of this part of the respondents' case, he produced several persons who had smelt the sulphur diffused by the calcination and tasted it in many places, some of them a mile away. Dr. Odling says (page 251), "It is only free sulphuric acid that would be sensible to taste or smell." And he states that he found the smell of it "pronounced in the neighbourhood of the bings:" "It just fell short of producing coughing." "I should think" he says, "that any continued exposure to such an atmosphere would be fatal to plant life."

It seems to me, that the various classes of evidence to which I have shortly adverted, fully sustain the view suggested by the state of things which arose in 1877, soon after the commencement of the calcination. Noxious matter is largely cast abroad, with probable injury of a kind definitely described to the trees it might affect; its actual presence upon them is shewn by chemical tests, and careful examination; and their new condition contrasted with that in which they had been before, is exactly such as it was calculated to produce. I think that in these circumstances the respondent has established his contention, and that he is entitled to the

interdict pronounced by the Lord Ordinary and the Court of Session, as well because of the injury he has already sustained, as for the prevention of future, and perhaps more serious, mischief.

It does not seem to me that the evidence of the appellants is at all sufficient to encounter the case so made against them. I see no reason, however, to impeach it as in any way inconsistent with the truth. The natural causes of deterioration to the woods, on which I have already observed, may have existed to a large extent. There may have been wetness of soil and injudicious planting under deciduous trees, and interruption of growth by roots, which should have been removed. But these and the other matters on which the appellants rely, do not account sufficiently for the proved condition of the woods, and the changes accomplished in 1877. It is necessary to the argument derived from them, that we should eliminate all the proof as to the action of the bings, the discharge from them of the sulphurous fumes, and the presence of destructive acid upon the trees. If we attribute any evil influence to these things, the respondent is not disentitled to the intervention of the law for his protection from it, even though the condition of the ground, or his own neglect or error, may have aggravated its injurious consequences.

If there were question of the amount of his damages, and his right to compensation, it might be important to shew that only to a certain extent he had suffered from the calcining operations, so as to relieve the appellants from responsibility for results produced by other causes. But it is enough for the maintenance of the interdict, that they have been proved, to some substantial extent, to have given ground for complaint heretofore, and for apprehension hereafter; and this being established, the appellants' proof, even if assumed to be true, fails to warrant their conclusion.

I do not go into further detail as to that proof. It has been very ably dealt with in the judgment of the Lord Justice Clerk, with which, in all its parts, I fully concur.

Neither do I feel at liberty to speak at any length as to the distances to which the sulphur fumes are proved to have been carried. The entire of the evidence bearing upon that important matter, on which I had meant to comment, has been so minutely

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discussed by my noble and learned friend that it is impossible to add anything usefully to his exhaustive observations. I shall only say, that they convey the view which I was led to adopt on a careful consideration of the very able arguments of the Lord Advocate, and the Attorney-General. I have no doubt that the Court of Session had abundant ground for holding that the fumes emitted by the bings were carried, with the smoke, at least a mile through the respondent's woods; and I have heard no sufficient reason for doubting that, according to Scotch practice, it was quite within its competence to select that limit for the operation of its interdict. It is important, however, that your Lordships should not be misunderstood as to your affirmation, in this respect, of the decision of the Court of Session. You do not, as I apprehend, mean to fix any absolute rule settling the distance within which, in such cases, an interdict should be allowed to operate. The special circumstances must determine in every instance the action of the Court; and according to them, e.g., the lie of the ground, the mode of calcination, the existence or the absence of precautions against injury, the prevalence of particular winds at particular seasons, the height and disposition of the trees, the interdict may properly be allowed to have efficacy, to a wider or more limited extent. We judge as best we can upon the evidence before us. Other evidence between other parties may properly induce a different ruling, and your Lordships do not design to make, in this respect, a rigidly binding precedent.

In another particular, I agree with my noble and learned friend. The terms of the interdict should be altered. As it stands, it forbids all calcining, in any circumstances, and under any conditions or modifications, within a mile of the bings. The prohibition is too large and stringent. It is conceivable that the process of calcination may, now or hereafter, be capable of being conducted in such a way as to make it possible so to deal with the fumes that they may be innocuous to the neighbourhood. We have before us, incidentally and without any view to this special point, evidence as to variance in the character of that process. In Durham, and in Dalry it is carried on, not in open bings, scattering broadcast, without check or stay, the noxious vapours, but in kilns, which may possibly render it less injurious. We cannot

say how far industrial invention may go in discovering the means of making it more consistent with the safety of vegetable life; and your Lordships would not desire, if this could be accomplished, to forbid or to restrict such operations as those of the appellants. I am quite of opinion that, in this regard, the interlocutor should be varied according to the view of the Lord Chancellor. In other respects, I think it should be affirmed with the variation proposed by my noble and learned friend.

LORD BLACKBURN:—

My Lords, I think notwithstanding some expressions in Lord Young's judgment which seem to suggest a doubt on the subject, it must be taken to be the law that if it is proved that the operations of the defenders cause real substantial injury to the property of the pursuer, he is entitled to have an interdict to protect him from that injury, even though it be impracticable to make use of the valuable minerals belonging to the defenders without doing such injury, so that the effect of the interdict is to prevent those minerals being used. I do not think it is proved by the evidence in this case that the interdict will produce such an effect; but if it were I do not think it would deprive the pursuer of his right to protection for his property. But I quite agree that it is essential to the pursuer's case that he should distinctly prove that the defender's operations do cause real substantial injury. Whether that is proved or not must in every such case depend upon the evidence in the particular case. *Salvin* v. *North Brancepeth Coal Co.* (1) was a case in which it was held that this was not proved; and the decision as to the fact was, I must assume, correct on the evidence in that case. It can be no guide to those who are to determine whether it was proved by other evidence in another case.

I have listened very attentively to the comments on the evidence made by the Attorney-General and Mr. Davey, but they failed to convince me that the finding in fact of the Lord Ordinary was wrong on this question of fact: and I agreed with the rest of your Lordships who heard the case in relieving the counsel for the respondent from arguing on the question whether there was

(1) Law Rep. 9 Ch. 705.

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sufficient damage shewn to entitle the pursuer to an interdict to some extent.

I think that the disease which it is shewn prevailed in the pursuer's plantations was not distinguishable by any certain marks from disease which might be caused by other causes. Bad drainage, insufficient thinning, and injudicious planting will all produce disease, and as plantations are managed roughly, I do not suppose there are many plantations in which some disease is not occasioned which would have been avoided if the trees in the plantation had been as carefully attended to as the trees in an orchard are; and this, I do not doubt, was to some extent the case in the pursuer's plantations. And independently of these causes, trees may become diseased (sometimes from their having attained such a growth that their roots get into a stratum of bad soil, and sometimes from causes which cannot be pointed out) though there is no work throwing off fumes in the vicinity. But I think that the evidence here shews that there was a great and marked change in the health of the trees contemporaneously with the beginning of those works, and that it was such as in other localities does arise from sulphuric fumes, which do produce disease, and after a time death, in plantations elsewhere: and though it is by no means shewn by the evidence what is the minimum quantity of sulphur fumes which will cause these results, it is shewn that a very large quantity of sulphur was sent off from the different bings, which when the wind blew towards the pursuer's plantations, would drift and did drift across them in quite sufficient quantities to account for the disease which did occur contemporaneously with the using of those works. This I think fully justified the finding of fact that real substantial damage had already been done, and that, if the works continued, that which was now disease would become death. I do not think it necessary, after what has been already said, to enter into the details of the evidence.

It was not suggested in the Court below that there was any mode by which these works could be carried on so as not to emit sulphur fumes so as to produce a nuisance, and no inquiry was made as to whether this could be practically done; but it is impossible to say that there may not at some future time be a mode discovered by which this may practically be done. I think,

therefore, that the interdict should be altered in the mode proposed, and I agree that this alteration should not affect the costs.

I think that on the evidence produced in this case it is established that if the works are removed to some distance from their present position, but not so far as to prevent their being a nuisance to the pursuer, his plantations will not only be injured but destroyed during the time which would necessarily be occupied in proving that the works in their new position are injurious, and I think that being so, it is necessary for the pursuer's protection to grant an interdict forbidding the carrying them on within a specified distance. What that distance should be is a much more difficult question. I come, however, on the evidence produced in this case, to the conclusion that it would not be safe to fix the distance at less than a mile. I wish to guard against its being supposed either that I think that in every case it must be necessary to fix so great a limit, or that in no case can it be necessary to fix a greater one. As far as I am concerned, I proceed entirely on the evidence in this particular case as applicable to this particular locality.

LORD WATSON :—

My Lords, this appeal raises no question except one of fact.

Notwithstanding the minute and exhaustive criticism to which the evidence was subjected by the learned counsel for the appellants, I see no reason to doubt that it is sufficient to establish, what the Court below have found, that the calcining operations of which the respondent complains, have already caused appreciable damage to his property, and will if permitted to continue, be productive of further and more serious damage.

The respondent is therefore entitled to decree of interdict; but I agree with your Lordships that the fact that injury has arisen from the ordinary process of calcining ironstone in open bings does not warrant an absolute prohibition against calcining by any process whatever at any future time. The interlocutor of the Court of Session, varied in the manner proposed by your Lordships, will in my opinion meet the justice of the case. It will give the respondent the measure of protection to which he is entitled, and will not prevent the appellants from availing themselves of the

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resources of science, and resorting to some method of calcination by which the noxious fumes, which have hitherto been allowed to escape into the air, may be recovered or destroyed. I had an opportunity of considering, in print, the judgment delivered by the noble and learned Lord on the woolsack, and I so entirely concur in the observations therein made with respect to the leading features of the proof, that it is unnecessary for me to make any comment upon it.

Interlocutor of the 18*th of March,* 1881, *granting the interdict, varied by adding after the words "within one mile of the pursuer's lands" the following words: "in the manner hitherto practised by them, or in any other manner whereby noxious vapour may be caused to pass over the pursuer's lands, or any part thereof, to the damage or injury of the pursuer's plantations or estate." Subject to that variation the interlocutors appealed from affirmed. Appellants to pay the costs of the appeal.*

Lords' Journals, 26th July, 1881.

Agent for Appellants: *W. A. Loch.*
Agents for Respondent: *Connell, Hope, & Spens.*

[HOUSE OF LORDS.]

GRAHAME . . . . . APPELLANT; E. L. (Sc.)

SWAN AND OTHERS (MAGISTRATES OF KIRKCALDY . . . . . RESPONDENTS. 1882 July 26.

Burgh—Common Good of Burgh—Encroachment by Magistrates on Burgh Property—Equitable Jurisdiction of Court of Session where restitutio in integrum impossible or attended with unreasonable Loss—Actio Popularis—Res Noviter.

A superior Court, having equitable jurisdiction, has a discretion in exceptional cases to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course. But to justify the exercise of such a discretionary power, there must be some very cogent reason.

A. suing, not as owner of the soil, nor as the proprietor of a dominant tenement, but as one of the community, applied for suspension and interdict on the 4th of May, 1878, against magistrates of a burgh, who were also police commissioners, building municipal stables on a piece of ground vested in them for the common use and enjoyment of the community. No interim interdict was granted, and the magistrates, who had accepted contracts for the work, went on building, and before the interdict sought was granted, on the 19th of June, 1879, the stables were completed at a cost to the community of about £1900. Thereupon in March, 1880, A. raised this action, concluding for, inter alia, a declaration that the ground in question was vested in the magistrates in perpetuity for the use and enjoyment of the inhabitants, and that they had no right as police commissioners to build thereon; and that they ought to be ordered to remove the stables. The magistrates offered to dedicate to the use of the inhabitants in lieu of the site of the stables another piece of ground which they had acquired by feu charter dated December, 1880:—

Held, agreeing with the judgment of the Court below, that in the peculiar circumstances of this case and on the considerations (1) that the community of the burgh had an interest on both sides of the present litigation; and (2) that the tender of a substituted piece of ground was *res noviter*, affecting the relations of the parties which had emerged since the date of the final judgment of interdict, it was not too late for the Court to exercise its discretionary power, and to refuse the remedy which A. asked so far as the removal of the stables was demanded.

Interdict—Necessary Proceedings—Costs.

Held, reversing interlocutor of the Court below, that A. was entitled to a declaratory decree affirming the right of the community in the ground in question; to the action being kept in Court until the substituted ground had been dedicated in perpetuity to the uses of the inhabitants; and his

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action being necessary for the vindication of the community's rights, he was entitled to his whole expenses in the Court below and in this House.

Per LORD WATSON:—Were A. seeking to enforce the decree which he holds in his own private right and interest, the considerations of inconvenience and pecuniary loss, arising from the position in which the magistrates have placed themselves, by their own acts, would not afford a relevant answer to his demand in the present action.'

Macnair v. *Cathcart* (Morr. Dic. 12,832); *Sanderson* v. *Geddes* (1 Court Sess. Cas. 4th Series, 1198); *Begg* v. *Jack* (3 Court Sess. Cas. 4th Series, 35), approved, as authorities in favour of the equitable jurisdiction of the Court; but see Lord Watson as to his disapproval of the result at which the Court arrived in *Begg* v. *Jack*.

APPEAL from the Second Division of the Court of Session, Scotland.

By charter of confirmation dated the 5th of February, 1644, Charles I. granted to the bailies, councillors, and community of the burgh for the time and their successors, the common muir of Kirkcaldy, which embraced the vacant ground between the town and the sea called the South Links.

This ground lay between the High Street and the seashore on the east, bounded on the south by John Loudoun's Wynd, which was also the boundary of the burgh at this spot. The South Links originally extended to about 8·172 acres. Down to the year 1754 these grounds remained the property of the provost, magistrates, town councillors, and community of the burgh, for the public purposes of the burgh.

In 1854 the magistrates feued the South Links to Robert Whyt, then provost of the burgh, "but under limitations and restrictions underwritten, viz., that there shall now and in all time coming be reserved to the inhabitants of Kirkcaldy one-third part of the said links in grass, as at present, for drying linen clothes allenarly, and free access thereto at all times for that end."

The subjects were reconveyed in 1788 to the magistrates on behalf of the community of the burgh, along with and under the limitations and restrictions specified in the above-mentioned feu contract of 1754.

Since 1788 a large portion of the South Links, extending to 6·976 acres, has been feued out and built on, and the remainder, amounting to 1·196 acre, was divided into two portions by an open sewer, which ran down Burleigh Wynd to the sea. This

was arched over and made into a street, called Burleigh Street. The whole of this ground was at one time known by the name of Volunteers' Green, although latterly that name has been appropriated to that portion which lies to the south of Burleigh Street, and which is about ·940 of an acre of extent. The portion of ground lying to the north of Burleigh Street and to John Loudoun's Wynd on the south, is the piece of ground to which the present action relates, and extends to ·256 of an acre.

In 1854 the magistrates attempted to build on a part of this ground, and a similar question to that here arose in the case of *Heggie* v. *Kirkcaldy Burgh Magistrates*, in the Sheriff Court of Fifeshire, the proof of which has been imported into this. Then an inquiry took place as to the use and possession which had been had of the ground by the inhabitants.

It appeared from the proof that the ground had once been surrounded by a wall and used as a town midden; at another time it was let, and occasionally shows, &c., had been allowed to occupy it for a small payment. But there could be no doubt that the ground was constantly used for the purposes of recreation and drying clothes, and the like. In that case the contemplated building was not put up, the decision being against the magistrates.

In 1877, the magistrates under "The General Police and Improvement (Scotland) Act 1862," and The Lands Clauses (Scotland) Act 1845, as police commissioners, acquired the ground from the magistrates, as town council. The price paid was £290. The commissioners thereupon gave notice in the local papers inviting a loan for the purpose of building stables on the piece of ground in question.

A Mr. Heggie objected, and threatened on the 7th of June, 1877, to take legal proceedings if they attempted to build on the ground. The commissioners intimated to Mr. Heggie on the 18th of July, 1877, that they intended to carry out their plans. The requisite amount of money was borrowed, and contracts for the work entered into.

On the 28th of February, 1878, the police commissioners commenced to build stables on the subjects above described. On the 4th of May, 1878, the appellant, James Grahame, dyer, Kirkcaldy, in the interest of the community, raised an action against

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the respondents to suspend the proceedings complained of, and to interdict them "from in any way encroaching upon that portion of the South Links or South Commonty of Kirkcaldy, which is now or was recently in grass, and which now remains or recently remained unfeued, and which extends from Burleigh Street of Kirkcaldy on the north, to the vennel called John Loudoun's Wynd on the south, and from property belonging sometime to the heirs of Thomas Meldrum, and other properties on the west, to the seaflood on the east, as the said portion is marked off and coloured red on the plan herewith produced; and in particular, to interdict, prohibit, and discharge the respondents, and all others aforesaid, from encroaching upon that portion of the said South Links, or South Commonty, which is commonly named or known as the Volunteers' Green, being part of the common good of the burgh of Kirkcaldy; as also to interdict, prohibit, and discharge the respondents, and all others foresaid, from digging foundations in, or in any way trenching or cutting up for building purposes, the said lands; and further, to interdict, prohibit, and discharge the respondents, and all others foresaid, from erecting stables or any buildings or erections of any kind thereon, or on any part thereof, and also from doing anything in or upon the said lands to the prejudice of the rights and interests of the complainers and other inhabitants of the burgh of Kirkcaldy, in so far as regards his and their rights of bleaching, drying clothes, and other rights competent to them in, upon, or over the said lands."

The magistrates, respondents, lodged defences, and a proof was adduced. The respondents, inter alia, averred, "the ground in dispute is to the west of the Volunteers' Green, and is separated from it by a road, Burleigh Street. In 1838 it was enclosed, and has since been used for various purposes connected with the town, but it has never been used for bleaching. For more than a century a certain portion of the links have been reserved in grass for drying clothes; but for more than forty years past the said use has been confined to that part of the links called the Volunteers' Green. No complaint has ever been made that this was insufficient for the public requirements."

The Lord Ordinary (1) granted the note of suspension and

(1) Lord *Adam*.

interdict; and the Second Division of the Court of Session adhered on the 19th of June, 1879 (1). No interim interdict was granted, and the magistrates continued their operations, and before final judgment was obtained the stables were completed at a total cost of £1889 10*s.* 5*d.*, including the cost of the ground. On the 4th of May, 1878, work to the value of £312 17*s.* 10*d.* was actually executed, and material had been laid on the ground of the value of £336 17*s.* 11*d.*

The stables having been completed, the appellant raised this action, concluding for declarator that the ground in question "is vested in the defenders, the said provost, magistrates, and council, on the condition that the same should be kept in perpetuity for the use and enjoyment of the inhabitants of Kirkcaldy for the purposes of bleaching clothes, recreation, and other similar purposes; (2) that from time immemorial, or at all events for forty years, the said portion of the said South Links or South Commonty has always been open and patent to the whole of the said burgh of Kirkcaldy, and that the said inhabitants have, for the said period, used, possessed, and enjoyed the same without hindrance, prohibition, or interruption, for drying and bleaching clothes, recreation, and other similar purposes; (3) that the defenders have no right or title to dig foundations in, or in any way to trench or cut up for building purposes, the said lands, nor to erect stables or any other buildings or erections of any kind thereon, or on any part thereof; and (4) that the erection by the defenders of stables or any other buildings or erection upon the said portion of the said South Links or South Commonty, or any part thereof, was and is illegal, unauthorized, unwarranted, and was and is to the prejudice of the rights and interests of the pursuer and other inhabitants of the burgh of Kirkcaldy in so far as regards his and their rights of bleaching, drying clothes, and other rights competent to them in, upon, or over the said lands; and, further, it ought and should be found and declared, by decree of our said Lords, that the defenders have no right to erect stables or any other buildings or erections upon the said portion of the said South Links or South Commonty, and that the erection of stables or other buildings or erections thereon is a

(1) 6 Court Sess. Cas. 4th Series, 1066.

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use of the same to the prejudice of the pursuer and the other inhabitants of the said burgh of Kirkcaldy; and whether decree of declarator shall be pronounced in terms of the foregoing conclusions or not, the defenders ought and should be decerned and ordained, by decree of the Lords of our Council and Session (first) to take down the stables and other buildings erected upon the said piece of ground, to remove the same and the whole materials of which they are formed and composed, from the said portion of the said South Links or South Commonty; and (second) to restore the said portion of the said South Links or South Commonty to the state and condition in which it was at and prior to the putting up of the said stables, buildings, and erections."

He averred, inter alia: "If the stables, &c., erected are not removed and the ground restored to its former condition the pursuer and the inhabitants of Kirkcaldy will be deprived of a bleaching green, and also of their other rights in the said piece of ground, and they will thus be subject to great loss and inconvenience. The defenders were repeatedly asked to give up the idea of building the stables, but refused to do so."

The respondents answered, inter alia: "At the time of the interdict being served, the defenders were not only under heavy contracts, but had a considerable portion of the work actually executed, and neither the pursuer nor anyone else had up to that time intimated the least intention of interfering. Interim interdict was not granted, and the defenders therefore, looking to the extent they were entangled by engagements actually contracted, and to the urgent necessity for the buildings, completed the work during the process of the action. The inhabitants have not used the said piece of ground as an ordinary bleaching green for upwards of forty years; but the defenders are nevertheless willing to provide another piece of ground for the purpose of bleaching and recreation of greater size, and in a more convenient situation. A plan shewing the situation of the ground in question is herewith produced, its extent is ·569 of an acre. The extent of the ground in dispute is only ·256 of an acre. The defenders have already endeavoured to satisfy the pursuers in this."

The respondents did not contest the declaratory conclusions of the summons, which they admitted to be decided in the pre-

vious action, but they opposed the conclusion for the removal of the buildings on the ground that they had acted in good faith, and were prepared to offer complete compensation in the shape of a piece of ground greater in extent.

The pleas in law for the appellant were, inter alia:—

(2.) The said ground having been used as a commonty for the purposes condescended on from time immemorial, the defenders were not entitled to change its character.

(3.) The said magistrates and council having acquiesced in the judgment of the sheriff, and having allowed the said bill to be altered as condescended on, are barred from pleading that the ground described in the summons may be devoted to other than common purposes.

(5.) The question of the pursuer's rights being now *res judicata*, he is entitled to have the said buildings removed and to have the ground restored to its former state, as concluded for.

(6.) In the circumstances the pursuer is entitled to decree of declarator, as concluded for, with expenses.

The pleas in law for the respondents were:—

(1.) The pursuer having permitted the defenders to proceed with their operations without objection, is now barred from insisting on the removal of the buildings.

(2.) The defenders having acted in bonâ fide, and having offered a full compensation for the ground in dispute, the pursuer is not entitled to decree, as concluded for.

1880. June 23. The Lord Ordinary pronounced the following interlocutor:—

"Finds and declares in terms of the declaratory conclusions of the action:—Farther, ordains the defenders to take down the stables and other buildings erected upon that portion of the South Links or South Commonty of Kirkcaldy mentioned in the conclusions of the action, and to remove the same, and the whole materials of which they are formed and composed, from the said ground; and further ordains the defenders to restore the said portion of the said South Links or South Commonty to the state and condition in which it was at and prior to the putting up of the said stables and other buildings, and decerns, &c."

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The respondents reclaimed. The Lords of the Second Division were in favour of sustaining the second plea in law stated for the magistrates, and assoilzing them from the conclusions of the action, on condition the ground shewed green on the in process map be given. The magistrates accordingly lodged in process a feu charter, dated 18, 24, and 30 of December, 1880, granted by the Ferguson's trustees, in their favour, of the piece of ground referred to in the defences, to be held by them for the community and inhabitants of the burgh as a public washing and bleaching green and recreation ground.

The Court on the 19th of January, 1881, pronounced the following interlocutor:—"In respect of the offer made by the defenders, to substitute for the ground in question the ground specified in the feu contract No. 13 of process, recall the said interlocutor: sustain the second plea in law stated in defence: assoilzie the defenders from the conclusions of the action, and decern." (1).

On appeal,

June 6, 8, 9. *Crossley*, Q.C, and *M'Kechnie* (of the Scotch Bar), maintained for the appellant that the interlocutor of the Court below was wrong. The judgment of the 19th of June, 1879, had not been appealed against, and was now *res judicata* against the respondents.

When final interdict is obtained "whatever has been done which could have been prevented, had the interdict been granted on the presentation of the note, must be undone:" Mackay's Prac. Ct. Sess. vol. ii., p. 237. It followed as a logical consequence that an order of removal should be granted.

There was no discretion in the Court of Session to exonerate this piece of public ground from the old trusts and substitute another. No doubt in *Jack* v. *Begg* (2), Lord Gifford said the Court had such equitable discretion; but his Lordship was there dealing with the case of a private right: and what the Court there thought was that what had been done by the complainer had barred him from getting removal of the gable, but not from compensation. In *Macnair* v. *Cathcart* (3) the only equity against the pursuer

(1) 8 Court Sess. Cas. 4th Series, 395; 18 Scot. L. R. 248.

(2) 3 Court Sess. Cas. 4th Series, 35.

(3) Morr. Dic. 12,832.

was his long silence, forty-eight years; the Lord Ordinary thought it impracticable to order restoration, part of the ground having become an important thoroughfare, and gave instead compensation. *Sanderson* v. *Geddes* (1) turned on the plea of acquiescence. These cases therefore did not apply. At least to allow equitable jurisdiction to prevail there must be bonâ fide mistake as to a right. Here the magistrates knew they had no right to build, from *Heggie's Case* in 1854, and also in this very case, before any buildings were erected, they were informed by another burgher that it was not legal. It was a nice question whether the ground was a substitution at all, it was burdened with an annual feu duty, and subject to mining by the superior. As to costs, the appellant had proved his case; that the magistrates had no right to do what they did, but the Court below left him to bear his own expenses. In the circumstances, the cost of restoring the ground to its original state and rebuilding the stables ought to be laid upon the individual members of the corporation.

There was no appeal on a mere question of costs, but when the whole matter was under review, and the interlocutor of the Court below is altered, it must be competent for the House to decide as to them.

[They also cited *Glen* v. *Caledonian Ry. Co.* (2); *Magistrates of St. Andrew's* v. *Wilson and Others* (3); *Home* v. *Young* (4).]

The Lord Advocate (*J. B. Balfour*, Q.C.), and *Gibson* (of the Scotch Bar), contended for the respondents, that the decision of 1879 was merely prohibitory, and had no retrospective effect. Although, in further proceedings, the ordinary consequence of the interdict would be removal, that judgment was no barrier to letting the stables remain. Then the question arose, is there no discretion in the Court of Session to allow an illegal structure to stand? That has been decided in *Macnair* v. *Cathcart* (5), *Sanderson* v. *Geddes* (1), and in *Jack* v. *Begg* (6), in the latter case Lord Gifford said: But "in all such cases, there is an equitable

(1) 1 Court Sess. Cas. 4th Series, 1198.
(2) 6 Court Sess. Cas. 3rd Series, 797.
(3) 7 Court Sess. Cas. 3rd Series, 1105.
(4) 9 Court Sess. Cas. 2nd Series, 286, at p. 304.
(5) Morr. Dic. 12,832.
(6) 3 Court Sess. Cas. 4th Series, 35.

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power vested in the Court, in virtue of which, when the exact restoration of things to their former condition is either impossible or would be attended with unreasonable loss or expense, quite disproportionate to the advantage which it would give to the successful party, the Court can award an equivalent." And where the Court think it right to exercise this equitable power, they will refrain from pronouncing perpetual interdict: Mackay's Practice, Ct. Sess. vol. ii. p. 238. Here, whether these stables are allowed to remain or not, will not affect any property the pursuer has. If he succeeds in this application he will destroy £2000 of the burgh property, and every householder will suffer.

For a judgment to be *res judicata*, the grounds and object of the action must be the same. The judgment in the first action was merely prohibitory not for removal, this is for removal, and they offered, what they could not do in the first, a substituted piece of ground; and therefore under these circumstances the interdict of the 19th of June, 1879, was not *res judicata* against them in this action.

The ground offered was of greater size, and the small annual feu duty was not likely to be left unpaid. As to costs, no doubt in the first action the appellant was in the right, but in this he had refused to accept their offer to provide another piece of ground, and must take the consequence.

[They also referred to Seton on Decrees, 4th ed. vol. 1, pp. 178, 179; *Isenberg* v. *East India House Estate Company* (1); *Goodson* v. *Richardson* (2); *Low* v. *Innes* (3); *London Brewery Co.* v. *Tennant* (4).]

Crossley, in reply:—

Costs would not satisfy the appellant; this was a question of public right, and not an adequate compensation case. The remedy now asked was adjudicated on by implication in the first action. There was here a plain legal title, and it is not for the Court to set up what it thought would be best for the community, the appellant must be looked upon as representing the whole body of the community: *Watson* v. *Cave* (5).

(1) 3 D. J. & S. 263.
(2) Law Rep. 9 Ch., at p. 223.
(3) 4 D. J. & S. 286.
(4) Law Rep. 9 Ch. 212.
(5) 17 Ch. D. 19.

The House took time for consideration.

July 26. LORD WATSON:—

My Lords, had the present action been the only proceeding taken by the appellant in order to vindicate his rights as an inhabitant of the burgh of Kirkcaldy, I should have had little difficulty in coming to the conclusion that, admitting the right of the community to have the whole area of the South Links kept free from buildings, the Court was, nevertheless, justified in refusing to ordain the stables in question to be taken down.

It appears to me that a Superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course. In order to justify the exercise of such a discretionary power, there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights. There are, so far as I know, only three decided cases, in which the Court of Session, there being no facts sufficient to raise a plea in bar of the action, have nevertheless denied to the pursuer the remedy to which, in strict law, he was entitled. These authorities seem to establish, if that were necessary, the proposition that the Court has the power of declining, upon equitable grounds, to enforce an admittedly legal right; but they also shew that the power has been very rarely exercised.

The earliest case is that of *Macnair* v. *Cathcart* (1). In the year 1777, Lord Cathcart purchased a small plot of ground from A., who in 1764 had made up a title by service as heir of the feuar last infeft. His Lordship, who was proprietor of the ground adjacent, at once proceeded to throw a portion of the plot into a new street which he was then forming, and built part of each of two new villas upon the remainder. In 1795, B. who, and not A., was the true heir of the deceased feuar, returned from foreign parts, and brought an action for the purpose of setting aside the title made up by A., as well as the disposition by A. to Lord Cathcart, and of recovering possession of his inheritance. The right of B. to the property of the plot in question was undeniable,

(1) Morr. Dict. pp. 12, 832.

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and there was no room for the plea of acquiescence as in bar of his action, because the service of A., and the sale to Lord Cathcart had been carried through during his absence from the country, and without his knowledge. But the Court, having regard to the great inconvenience which would result from giving effect to the pursuer's legal rights, refused to grant decree of reduction and removing; and permitted Lord Cathcart to remain in possession as owner of the land in dispute, upon condition of his paying full compensation to B.

The next case is that of *Sanderson* v. *Geddes*, decided by the First Division of the Court, in 1874 (1), where the facts were these. The proprietor of a house having a mud gable four feet thick, built a second tenement at the end of the gable, which thus became in fact mutual; and then, by *mortis causâ* deed, conveyed the original dwelling to A., and the new house to B. At his death A. took down the mud gable and built one of stone and lime two feet thick, upon that portion of the old site which was next to B.'s house, and so gained two feet of interior space for his own. After the erection of the new gable was completed, B., who had made no objection to A.'s operations, although, if not aware, he might at least have informed himself of their progress, brought an action concluding for its removal. The Court refused to ordain its removal, but held that B. was entitled to use it as a mutual gable upon making the usual payment under deduction of such sum as might represent the benefit which A. had obtained by his encroachment. The effect of the judgment was not, as in the case of *Macnair* v. *Cathcart* (2), to deprive the owner of his right of property in the *solum*. It merely deprived him of the exclusive use and possession of his property until the new gable became ruinous or was pulled down.

The last authority to be found in the books is *Begg* v. *Jack* (3), and in regard to that decision I desire to say that, whilst it may fairly be accepted as an authority in favour of the equitable jurisdiction of the Court in such cases, I am not satisfied that the result at which the Court arrived is such as your Lordships ought

(1) 1 Court Sess. Cas. 4th Series, 1198.

(2) Morrison's Dictionary, pp. 12, 832.

(3) 3 Court Sess. Cas. 4th Series, 35.

to approve. Two feus in the suburbs of Edinburgh were separated by a garden wall. A., the proprietor of one of them, insisting that the wall was entirely built on his land, proceeded to pull it down, and to erect on its site a gable wall several storeys in height. B. and others, the proprietors of the other feu, maintained that half of the site of the old wall was their property, and objected from the first and throughout to A.'s operations. The facts are correctly summarised by Lord Gifford, who says (1), "It is clear that the pursuers (B. and others), never consented, either expressly or by implication, to the gable in question being erected on their ground. On the contrary, I think the correspondence shews that the pursuers all along objected and warned the defender that he was proceeding at his own risk, while at the same time they were negociating terms of agreement or arrangement. No agreement, however, was come to, the parties having differed as to the responsibility for any damage which might be occasioned to the schoolroom." The Court held that one half of the site of the wall was the exclusive property of the pursuers, but they refused to ordain the removal of the new gable and allowed it to stand upon the condition that the pursuers should be entitled if they chose, to use it as a mutual gable, without making the customary payment to A. in respect of that privilege. The pursuers had unfortunately for themselves expressed their willingness in the course of the dispute to compromise it upon the terms ultimately forced upon them by the Court, and that seems to have been one of the leading grounds of the judgment against them, which humbly appears to me to trench upon private rights of property, to an extent altogether unwarranted by any previous authority in the law of Scotland. The practical effect of the judgment was that the Court gave the wrongdoer compulsory powers to acquire part of his neighbour's property, which, in spite of remonstrance, he had illegally appropriated.

In each of these three cases the object of the action was to recover possession of the pursuer's estate of fee, and to oust the party by whom it had been invaded. I do not mean to suggest that the owner of a servitude is not entitled to the same protection from the Court against invasion of his right as a proprietor of the

(1) 3 Court Sess. Cas. 4th Series, at p. 42.

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soil. But the appellant sues, neither as the owner of land, nor as the proprietor of a dominant tenement, and as such in right of a servitude. He does not even sue as the owner of property within the burgh of Kirkcaldy, but as one of the community of the burgh. The right and interest of a burghal proprietor, whose property is near to or abuts upon the South Links, differs in degree from the right and interest of a person whose connection with the burgh is dependent upon residence alone. The interest of the one may be proprietary in this sense, that an alteration in the condition of the Links will affect, not his personal convenience merely, but the value of his property into whose hands soever it may come. The right and interest of the other is personal and transient, and cannot be distinguished from that of the rest of the inhabitants of the burgh. This suit is truly an *actio popularis*, inasmuch as it is brought for the vindication of a right common to all the inhabitants, and in disposing of it the Court must, according to my apprehension, consider, not the interest of the individual pursuer, but the interest of the general community.

Now it is conceded in this case that the respondents have, contrary to the right of the community, spent nearly £1900 of their ratepayers' money in erecting stables upon a portion of the South Links, nearly a quarter of an acre in extent. The stables are required for police purposes, and the outlay would have been unobjectionable had it not been made upon the Links. The respondents have since acquired about half-an-acre of ground at some distance from the Links for a present payment of £250, and an annual feu duty of £14 14*s.* 7*d.*, which they offer to dedicate to the use of the community, in lieu of the present site of the stables. The learned Judges of the Second Division were very clearly of opinion, (and so far I have no difficulty in agreeing with them) that, although the appellant asserts the contrary, it would be much more for the advantage of the community to accept the substituted ground, and allow the stables to stand, than to ordain the stables to be pulled down, seeing that in that case they must be rebuilt elsewhere at the expense of the burgh ratepayers, who may be taken as fairly representing the bulk of the community. On that ground their Lordships have refused to decern for removal of the stables.

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The difficulty which I have felt in regard to the interlocutor under appeal arises from the circumstance which is not noticed in any of the opinions delivered in the Court below, that, before the present action was instituted the appellant had obtained decree in a process of suspension and interdict directed against the respondents in relation to the erection of these stables. The application for interdict was made upon the 4th of May, 1878, and the respondents appeared and disputed the right of the community on various grounds. As an alternative defence the respondents alleged that at the date of raising process, mason work had actually been executed to the value of £312 17*s.* 10*d.*, that materials had been laid down on the ground of the value of £336 17*s.* 11*d.*, that part of the buildings were ready for roofing, and that they had made contracts for the completion of the work; and upon these allegations they pleaded that the application was not presented in time, and ought therefore to be refused. There was no *interim* interdict, and the respondents went on with the work and completed it during the dependence of the process, which came to final judgment upon the 19th of June, 1879. On that date, after both parties had led proof of their averments, the Second Division of the Court, adhering to the interlocutor which had been pronounced by the Lord Ordinary, overruled all the pleas stated by the respondents, and interdicted them, *inter alia*, "from erecting stables, or any buildings or erections of any kind," upon that portion of the South Links which is now in dispute, or any part thereof.

As between the appellant and the respondents, the judgment of the 19th of June, 1879, is now *res judicata*. It was not disputed at the bar that the final decree prohibitory in a process of suspension and interdict draws back to the date of the application, and strikes against everything that has been done by the respondents after that date. It would, in my opinion, be most unfortunate were a respondent who has proceeded with his operations during its dependence, to be held at the end of the litigation to be in any better position because there has been no *interim* interdict. The rule of the law of Scotland is, *pendente lite nihil innorandum:* and whatever a party chooses to do after the matter is litigous he does at his own risk. The ordinary and legal result of the final

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interdict is, that the party who has obtained it has a right to apply for and obtain a judicial order to undo that which has been so done; and it has always been regarded as a necessary consequence of that right, that the order for removal must be extended to that which had been erected before the litigation began.

If the judgment of the 19th of June, 1879, had been a decree capable of being put into execution without the intervention of the Court, it would have been too late to consider whether these buildings ought or ought not to be taken down; but the appellant has no means of enforcing it, except by a new application to the Court for an order of removal. Even in that application, it is, in my opinion, too late for the respondents to resist the granting of the order upon considerations which either were, or might have been, competently pleaded by way of answer to the note of suspension and interdict. If the Court were to entertain such pleas at that stage of the procedure, it would be practically reviewing its own final judgment, upon grounds which had been pleaded, or which the party was bound to plead, in the suit in which that judgment was pronounced. If, however, there be *res noviter* affecting the relative position or rights of the litigants which have emerged since the date of the final judgment, the Court is not only entitled, but bound, to take cognizance of them, and to consider whether in the altered circumstances of the case, the decree previously granted ought or ought not to be enforced.

My Lords, if the controversy between the appellant and the respondents had related to a heritable right, the private property of the appellant, I should have been very clearly of opinion that the judgment of the Second Division could not be sustained; and it is with great difficulty that I have ultimately come to the conclusion that the circumstances of the present case are sufficient to justify a refusal of the remedy which the appellant asks. In arriving at that conclusion I have been mainly influenced by these considerations: first, that the community of the burgh, whose rights are at stake, has an interest on both sides of the present litigation; and secondly, that the tender of a substituted piece of ground is, in this sense, *res noviter*, that the ground was not the property of the burgh or under the control of the

corporation at the time when the appellant obtained decree of interdict. Were the appellant seeking to enforce the decree which he holds in his own private right and interest, I do not think the considerations of inconvenience and pecuniary loss to the respondents arising from the position in which they had placed themselves, by their own acts, would afford a relevant answer to his demand in the present action. But these considerations assume a very different aspect when the necessary result of disregarding them will be to inflict that loss and inconvenience upon the community whose interest the appellant represents. In the peculiar circumstances of this case, I do not think it is too late to consider the interest of the community, and I agree with the Court below that their interests will be better served by giving them the field recently acquired by the corporation in exchange for the portion of the links of which they have been deprived, instead of granting an order which will have the practical effect of charging the community, or the common good of the burgh, with the whole expense of taking down the stables and re-erecting them upon a new site.

It was suggested in argument by the appellant's counsel that the cost of restoring the ground in dispute and rebuilding the stables ought to be laid upon the individual members of the corporation. But the present action is brought for the purpose of imposing liability upon the corporation and its corporate estate and not upon individuals. I cannot regard the proceedings of the respondents in building upon ground which they were under a legal duty to keep open for the use of the inhabitants as at all praiseworthy; and they were certainly not bonâ fide in any proper sense of that term. The most that can be said for the respondents is that they did not act malâ fide, and I am not prepared to hold that they ought to be made personally responsible for the consequences of what they have done in violation of the rights of the community. As a member of the community the appellant has an unquestionable title to vindicate the customary rights of the inhabitants to use the South Links for bleaching and other purposes; but no member of the community has a title to call the respondents to account generally for their maladministration of the common good of the burgh. The respondents are not

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answerable for their administration of the burgh property, as if they were trustees for the community. Except in so far as its actings may interfere with the personal uses which an inhabitant is entitled to make of the burgh property, the corporation is only accountable to the Crown for its administration of that property. The law is so stated by Mr. Erskine (Book I. tit. 4, sec. 23); and was affirmed by the Court in the case of *Mollison* v. *Magistrates of Inverury* (1).

But assuming that the respondents are not to be ordained to remove the stables, the appellant has still, in my opinion, good reason to complain of the interlocutor of the Second Division, in respect that (1) it assoilzies the respondents from the whole conclusions of the action, including the declaratory conclusions, and thus negatives the appellant's right, which is admitted on all hands; (2) it throws the action out of Court, in respect of the offer made by the respondents to give substituted ground; and (3) it leaves the appellant to pay the whole expenses of process incurred by him.

It appears to me that the appellant ought to have a declaratory decree affirming the rights of the community in the piece of ground in question, and that the action must be kept in Court until the substituted ground has been properly laid out and dedicated in perpetuity to the uses of the inhabitants. I am also of opinion that the appellant ought to have his expenses in the Court below, as well as the costs of this appeal. I cannot understand why the Judges of the Second Division refused him even the expense of bringing the action into Court, although it was raised in the beginning of March, 1880, and the respondents did not acquire the ground which they offer until the month of December following. I cannot discern in these proceedings any indication of a desire on the part of the respondents to recognise the right of the community, except in so far as they might be compelled by legal process. The appellant's action appears to me to have been raised in the interest, and carried on for the benefit, of the community, and to have been necessary for the vindication of their right.

[His Lordship then moved the order and judgment, which was adopted by the House; and which will be found at page 570.]

(1) 14 Dec. 1820, 20 Fac. Coll. 218.

LORD SELBORNE, L.C.:—

My Lords, I concur entirely in the judgment which my noble and learned friend has just moved.

It is inseparable from the principles of equitable jurisdiction, that its exercise may be withheld where on the balance of conflicting considerations the reasons against the interference of a Court of Equity are found to preponderate. In England before the Judicature Acts the result under such circumstances would generally have been to leave the parties to their rights and remedies at law. But in cases of public or charitable trusts, (and the present case is one which, in England, would be deemed to be of that nature), the English Court of Chancery would always have felt itself bound to pay regard to the general benefit of those interested in the trust, and might on that principle have given its sanction, on proper terms, to any arrangement which might appear on the whole to be beneficial under the actual circumstances, even when that which was in strictness illegal and unauthorized might have been done by the administrators of the trust. In Scotland the legal and equitable jurisdictions have always been united, and the natural result of that unison is that strict legal rights ought not, in such a case as the present, to be enforced without regard to the discretion which from the nature of the subject-matter, and of the interests of all those concerned in it, ought to be exercised by a Court of Equity.

The great difficulty in this case has arisen from the interdict granted in the former suit. But I cannot think that this ought to be an absolute bar to the discretionary power of the Court, when the whole matter (including some new circumstances) comes before it in a subsequent suit, to do what may seem on the whole to be most proper and beneficial. This is the view which has prevailed in the Court below, and I willingly concur in the motion as to the proper mode of dealing with this appeal, which has been submitted to your Lordships by my noble and learned friend, who is so familiar with the law of Scotland. The order which he has proposed will give full effect to the governing principle of the decision of the Court below, while it will correct the error into which that Court has fallen from a too exclusive and summary regard to that principle; and it will also give the appellant (what

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I think he is clearly entitled to) his costs of the proceedings, which he has properly taken, to rectify acts wrongfully done by the respondents, and which have resulted in an equitable settlement of the matters in dispute, which could not otherwise have been made by lawful authority.

LORD O'HAGAN:—

My Lords, on the substance and merits of this case I have had no doubt, since I heard the argument, that the respondents should succeed. The only question of apparent difficulty has arisen as to the effect of the suspension and interdict pronounced whilst the buildings, the subject of the controversy, were in progress, in fettering the discretion of the Court. The Lord Ordinary did not grant an interim interdict, but final judgment was given by the Court of Session on the 19th of June, 1879, founded on the view that the respondents, as magistrates and town councillors, were in error in not keeping the public common, otherwise the links, of the burgh of Kirkcaldy, free and open for the use of the inhabitants as a bleaching green and for their recreation, but had, on the contrary, determined to erect, and had partially erected upon it, stables and other buildings for the purposes of the municipality. The respondents, before the institution of these proceedings, had been allowed to advance a considerable way with the works without interruption or protest. Their estimates had been made. Their contracts were completed. The walls of the buildings were six feet in height. A good deal of the public money had been expended; and, in the absence of an interim interdict, the respondents—convinced, as they say, that they had a right to do so—bound by their contracts and believing that the buildings were required for public purposes, proceeded to complete them. In strictness they had no right so to proceed. The interdict finally pronounced had retroactive force relating back to the commencement of the suit, and condemning any works executed in the intervening period, in contravention of its purpose and its terms. Those works having been prosecuted, pendente lite, were technically tainted with illegality and liable to be abolished.

The question of difficulty suggested, I think, by one of your Lordships was, whether the final decree did not disable the Court

from entertaining the proposal of the respondents to have the buildings maintained, on the substitution of another piece of land for that on which they had been placed, with equal convenience for bleaching and recreation to the Kirkcaldy public, and with substantial saving to their municipal treasury? This one consideration seemed to me material, as impeaching the jurisdiction of the Court to contravene and nullify its own antecedent act, even for objects of public advantage. But I have come to the conclusion that it ought not to prevail. The point so raised is one of practice, and of the practice in Scotland the judges of Scotland are most competent to speak. In this case, all the facts capable of raising the question were necessarily forced on the attention of the Court of Session. It had before it the note of the Lord Ordinary, distinctly and expressly pointing to the conduct of the respondents as illegal and incapable of pecuniary compensation; but resting his decision against them on the ground of the convenience of the inhabitants, and not of his own incapacity to consider the offer of substitution. The facts as to the progress and completion of the works, whilst the cause was pending, are clearly stated throughout the judgments on the action of declarator. So that this point, if it was tenable at all, must have been inevitably suggested to those most qualified to decide upon it. It was not hinted at by any of them, and the counsel for the appellant did not put it forward. I think it not too much to say that the abstinence from allusion to such an argument is persuasive proof of its invalidity.

But in addition to this, the point has been discussed with clearness and force by my noble and learned friend (Lord Watson), whose mastery of Scotch law and practice enables him best to judge of it. I have had the advantage of reading his opinion and, in connection with the matter I have mentioned, it fully satisfies me that the Court of Session was not precluded, and this House is not precluded, by any lapse of jurisdiction, from dealing with the subject freely, and doing what is required by equity and reason. The peculiarity of the case, as involving the general interests of a community, his membership of which alone entitles the appellant to be heard, and the occurrences which, since the pronouncing of the decree of interdict, have enabled the respondents to make a proposition apparently conducive to those interests and compen-

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sative for the error into which they fell, with an honest desire to do their duty,—these things are of great weight as justifying the action of the Court of Session, and accounting for the want of remonstrance against the jurisdiction it assumed, on the single ground on which it might plausibly have been offered.

Getting rid of this objection, the case seems to me to be a clear one. I adopt the words of Lord Giffard in *Begg* v. *Jack* (1): "There is an equitable power vested in the Court in virtue of which when the exact restoration of things to their previous condition is either impossible or would be attended with unreasonable loss and expense quite disproportionate to the advantage it would give to the successful party, the Court can award an equivalent. In other words, they can say upon what equitable conditions the building should be allowed to remain where it is, although it has been placed there without legal right." That opinion is supported by several Scotch decisions of undoubted authority, and seems to me quite in accordance with sound principle and the practice of English Courts of Equity; and, if it be sustainable, the facts of the case abundantly justify the decision of the Court of Session.

The respondents erred, not by any act of malversation or self-seeking or wilful neglect of their obligations to the community to which they were placed in a fiduciary relation. They were only wrong in applying to one purpose a little bit of land which they were legally bound to apply to another. But the purpose to which they applied it was a good one and promotive of the general welfare, and they seek condonation of their mistake by the substitution of another bit of land, which, in its position and capabilities, is as valuable to the burgh as that which, for the service of the burghers, has been utilized in another way. In such a case, it is necessary for the justification of such a substitution to shew, in the words of the Lord Justice Clerk, "that on the one hand no interest will be endangered, and on the other, great loss will be incurred." This has been done in the case before us. The Court has come to the conclusion that Kirkcaldy will have a satisfactory equivalent for the loss of the means of bleaching and recreation of which the appellant, on its behalf, complains; whilst it is spared the cost of the removal of buildings

(1) 3 Rettie, p. 43.

in themselves useful to it, which could only be destroyed at the expense of some £2000. The cy-près principle was never more judiciously applied than in the acceptance of such an equivalent, and it should scarcely be refused on the pressure of an unreasonable litigant who has no personal right to assert and no personal wrong to remedy,—who proceeds only in the name of his fellow burghers, and declines any arrangement which might do them a service or save them from an injury, relying on a rigid and high-handed claim for restoration to the status quo, without regard to consequences.

Taking this view, I have no doubt that the interlocutor of the Court below, modified as has been suggested by my noble and learned friend, should be adopted by the House.

LORD BLACKBURN:—

My Lords, I have had the advantage of reading the opinion of my noble and learned friend (Lord Watson) in which I agree. I never felt any doubt that, if the Court of Session had a judicial discretion to refuse to order buildings which have been wrongfully erected, to be removed, on the grounds that substantial justice between the parties would not be thereby done, and that the defenders were in a position to offer a sufficient equivalent which would be more beneficial for the pursuers, and less burthensome to themselves, this discretion was in the present case properly exercised by the Court.

Had the case of *Macnair* v. *Cathcart* (1) occurred in England, I think the plaintiff would have recovered possession in ejectment without asking for the aid of a Court of Equity; and when he recovered possession he might have pulled down the two ends of Lord Cathcart's villas, unless paid whatever sum he demanded; and as there appears on the facts as reported to have been no ground on which a Court of Equity could have interfered, the defendant must either have refused to pay anything, leaving the plaintiff to do what would be no benefit to himself, but very annoying to the defendant, or have paid what the plaintiff's conscience permitted him to demand. It was, and I suppose still is,

(1) Morr. Dict., pp. 12, 832.

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usual when a case is likely to involve such points to try to get it referred to an arbitrator, with power, amongst other things, to order what is just to be done. It seems from that case that the Court of Session have the powers which an arbitrator under such a reference would have had. I agree that such a power should not be lightly exercised, and I concur in the doubt expressed by the noble and learned Lord opposite (Lord Watson) whether it has always been properly exercised; but in the present case I think it is rightly exercised.

I also agree that it is important that such a point should be raised at as early a stage of the pleadings as it can reasonably be raised. I am glad that he has been able to come to the result that it was not too late to raise it in the present case. I do not pretend on a question of Scotch pleading to form an opinion of any value.

As to the form of the order of this House, I concur in that which is proposed.

LORD BRAMWELL concurred.

Interlocutor appealed from reversed; Declared that the portion of the South Links or South Commonty of Kirkcaldy, which extends from Burleigh Street of Kirkcaldy on the north to the vennel called John Loudoun's Wynd on the south, and from property belonging sometime to the heirs of Thomas Meldrum and other properties on the west to the sea flood on the east, as the said portion is marked off and coloured red on the plan produced, was vested in the respondents, the provost, magistrates, and council of the burgh of Kirkcaldy, on the condition that the same should be kept in perpetuity for the use and enjoyment of the inhabitants of Kirkcaldy for the purposes of drying or bleaching clothes and of recreation; that from time immemorial, or at all events for forty years prior to the erection of the buildings after-mentioned, the said portion of the said South Links or South

Commonty had always been open and patent to the whole inhabitants of the said burgh of Kirkcaldy, and that the said inhabitants had for the said period used the same without hindrance, prohibition, or interruption for drying or bleaching clothes and for recreation: that the erection by the respondents in or about the year 1878 *of stables and other buildings or erections upon the said portion of the said South Links or South Commonty was illegal, unauthorized, and to the prejudice of the rights and interests of the appellant and other inhabitants of the burgh of Kirkcaldy in so far as regards his and their rights of drying or bleaching clothes and of recreation over the said ground, and that the appellant ought to have decree to that effect under the declaratory conclusions of his summons: Further declared that in present circumstances and having regard to the offer made by the respondents to provide the ground described in the feu charter granted by Mrs. Emma Eliza Munro Ferguson and others, testamentary trustees of the late Robert Munro Ferguson of Raith and Novar to and in favour of the magistrates and town council of Kirkcaldy, dated* 18*th*, 24*th*, *and* 30*th December*, 1880, *and recorded in the Division of the General Register of Sasines applicable to the county of Fife, the* 15*th day of July*, 1881, *No.* 13 *of process, as an equivalent for the portion of the South Links or South Commonty of Kirkcaldy herein above described, it is not expedient or for the interest of the community of the burgh that decree should be granted for the removal of the said stables and other buildings. Subject to these declarations, cause remitted to the Second Division of the Court of Session with these directions, that upon the said ground proposed to be substituted for that part of the South Links*

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which has been wrongfully appropriated by the respondents being properly laid out and dedicated to the uses of the community to the satisfaction of the Court, the Court shall find it to be unnecessary further to dispose of the declaratory conclusions of the summons, and shall assoilzie the respondents from the remaining conclusions thereof.

Respondents to pay to appellant the whole expenses of process incurred by him in the Court below, and also the costs of the appeal to this House.

Lords' Journals, July 26th, 1882.

Agents for appellant: *Keeping & Co.*
Agent for respondents: *William Robertson.*

[HOUSE OF LORDS.]

CHARLES FITCH KEMP . . . . . APPELLANT;

AND

HERMANN EUGENE FALK . . . . . RESPONDENT.

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Sale of Goods—Sub-sale—Bill of Lading, indorsement of—Stoppage in transitu.

The purchaser of goods (shipped by the vendor) consigned them abroad, and indorsed the bill of lading to a bank as security for an advance. Afterwards and before the arrival of the ship the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bankrupt, the unpaid vendor gave notice to the master, after the sub-sales but before delivery and before payment of the freight, to stop the goods in transitu. The consignees remitted the proceeds of the sub-sales to the bank, who after repaying themselves their advance handed to the trustee of the bankrupt the balance, which was less than the original purchase-money:—

Held, affirming the decision of the Court of Appeal, that the principles established by *In re Westzinthus* (5 B. & Ad. 817) and *Spalding* v. *Ruding* (6 Beav. 376; 12 L. J. (Ch.) 503) were applicable; that the right of stoppage in transitu was not at an end when the notice was given; and that the vendor was entitled to the balance after satisfaction of the bank's claim.

APPEAL from a decision of the Court of Appeal.

The facts (as stated in an agreed statement of facts used on the hearing in the Bankruptcy Court) are fully set out in the report of the case below: *Ex parte Falk, In re Kiell* (1). The following is an outline of that statement.

In March 1878 Kiell bought on credit from Falk a cargo of salt, chartered the *Carpathian* and consigned the salt (which had been put on board by Falk) to Wiseman Mitchell & Co. of Calcutta. Through T. Wiseman & Co. of Glasgow, the agents of Wiseman Mitchell & Co., Kiell obtained an advance from the Bank of Scotland upon the security of the bills of lading which Kiell indorsed. In July Wiseman Mitchell & Co. sold the cargo "to arrive." On the 20th of July Kiell went into liquidation, and Falk on the 27th served on the shipowners in Liverpool

(1) 14 Ch. D. 446.

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notice to stop in transitu. The ship arrived at Calcutta on the 29th of July; part of the cargo was delivered to sub-purchasers on the 3rd of August, and the remainder, after notice to stop in transitu had been served on the captain, on the 5th of August. Wiseman Mitchell & Co. remitted the proceeds of the subsales to the Bank of Scotland, who deducted the amount of their advance and paid the balance to the appellant, Kiell's trustee in bankruptcy. Falk having applied to the Court of Bankruptcy to order the trustee to pay over the balance, which was less than the amount for which Falk sold to Kiell, the Registrar sitting as Chief Judge refused the application. On appeal the Court of Appeal (James, Baggallay and Bramwell L.JJ.) granted it.

The appeal was part heard on the 3rd of November 1881 before Lords Penzance, Blackburn and Watson, when

Benjamin Q.C. and *G. W. Lawrance* appeared for the appellant, and

Cohen Q.C. and *F. Thompson* for the respondent.

During the opening of *Benjamin* Q.C. some of their Lordships expressed a desire to have further information as to the subsales, the delivery of the goods under them, and the payment of freight, and the hearing was adjourned that the parties might agree as to those facts.

Upon the further hearing 10th July 1882 the following agreed statement of facts was submitted to the House.

1. No delivery order for the cargo of the *Carpathian* was given by Messrs. Steele & Co. (the agents in Calcutta for the shipowners) to the sub-purchasers or the consignees, but the consignees indorsed the bill of lading and delivered the same to the captain of the *Carpathian* together with a letter in the following terms:

"Calcutta 2nd August 1878.

"To the commanding officer of the ship *Carpathian*.

"Dear Sir,—In order to save trouble we will not sign delivery orders for salt, but have written our sircar on board the above vessel to deliver salt to those men who produce cash receipts from our cashiers.

(Signed) "Wiseman Mitchell Reid & Co."

2. The sub-purchasers paid their purchase-moneys to Messrs. Wiseman Mitchell Reid & Co. the consignees for the quantities of salt purchased by them respectively and took receipts for the same from the cashier of the said consignees, and thereupon the sub-purchasers took the receipts to the vessel and the quantities of salt for which they had respectively thus paid were then weighed out and delivered to them respectively, in the presence and under the supervision of the master or other officer of the ship and the sircar or clerk of the consignees in accordance with the letter of the 2nd of August 1878. No arrangement was entered into for the payment of the freight other than that contained in the charterparty and bill of lading, copies of which are to be found in the supplemental appendix. The freight was paid in two instalments on August 22 and September 3.

The above facts are to be taken as corrections and modifications of the statements in paragraphs 19 and 20 of the special case as printed in the record in the House of Lords (1), and as fixing the exact dates at which the freight was paid.

July 10. *Bompas* Q.C. and *G. W. Lawrance* (*Benjamin* Q.C. with them) for the appellant:—

The right of stoppage in transitu was at an end when Kiell the purchaser, by his agents at Calcutta, sold the goods to sub-purchasers before the arrival of the ship. *In re Westzinthus* (2) and *Spalding* v. *Ruding* (3) do not conclude this case, for there property remained in the bankrupt on which the right to stop could attach; here all that was left after the mortgage to the bank he had sold. The right to stop the *goods* was admittedly gone: per Bramwell L.J. (4). No property in the goods remained in the bankrupt; nothing but a right to the surplus proceeds after paying off the bank: the doctrine of stoppage in transitu is not applicable to such a right. *Ex parte Golding Davis & Co.* (5) went further than any case yet, and is wrong. If not at an end before, the right to stop was gone when on the 2nd of August the

(1) The substance of these paragraphs appears 14 Ch. D. 448, beginning "on the 30th of July;" and is also stated in the judgment of Lord Watson here.

(2) 5 B. & Ad. 817.

(3) 6 Beav. 376; 12 L. J. (Ch.) 503.

(4) 14 Ch. D. 452.

(5) 13 Ch. D. 628.

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consignees gave to the sub-purchasers cash receipts and an undertaking to deliver upon production of the receipts; or at all events when part of the cargo was delivered to the sub-purchasers; for that amounted to a delivery of the whole, the captain having received the bill of lading upon the understanding that he was to hold the whole for the consignees and to the order of the sircar; delivery of part of one entire cargo takes away the right to stop; per Best J. in *Crawshay* v. *Eades* (1); *Tanner* v. *Scovell* (2); *Slubey* v. *Heyward* (3); *Hammond* v. *Anderson* (4). The consignees are stated to have indorsed the bill of lading and delivered it to the captain, and the inference is that they were themselves indorsees for value; and if so the right to stop was gone. Lastly, the cash receipts were documents of title within the Factors Act 1877 (40 & 41 Vict. c. 39) s. 5, and there was a transfer or delivery within that section, so as to defeat the right to stop.

Cohen Q.C. and *F. Thompson* for the respondent were not heard.

LORD SELBORNE L.C.:—

My Lords, you have heard the argument of the two learned counsel for the appellant, and I believe that your Lordships are all of opinion that it is unnecessary to hear any further argument in the case. To me it seems a case of very great simplicity.

It is admitted that but for the indorsement, or if there were more than one, the indorsements, of the bill of lading of the cargo in the *Carpathian*, the right of stoppage in transitu would have been well exercised as against everybody on the 5th of August, after which the greater part of the cargo was delivered to an amount which makes it immaterial between the parties to consider any question as to the few and small parcels which had been delivered before. Then the question is, What is the effect of the indorsement of the bill of lading? It was an indorsement to the Bank of Scotland, who had advanced money upon it; and the cases of *In re Westzinthus* (5) and *Spalding* v. *Ruding* (6) clearly establish that the right of stoppage in transitu is not

(1) 1 B. & C. 185.
(2) 14 M. & W. 28.
(3) 2 H. Bl. 504.
(4) 1 B. & P. N. R. 69.
(5) 5 B. & Ad. 817.
(6) 6 Beav. 376; 12 L. J. (Ch.) 503.

discharged absolutely by an indorsement of a bill of lading by way of security or pledge, but that it remains, in Equity at all events (and that is quite enough for the present purpose), as it was before, subject to a charge in favour of the indorsee of the bill of lading, which must be paid off, and which being paid off, the person entitled to, and exercising, the right of stoppage in transitu stands in exactly the same position as to everybody else as if there had been no security, and no pledge, and no indorsement of the bill of lading. And against what is that right of stoppage in transitu? Not against some imaginary interest of the purchaser, but against the goods themselves. It is a right to stop the goods; and I have no notion of any right of stoppage in transitu which is not a right to stop the goods when they are still in transitu in contemplation of law. It is a qualified right in the circumstances which I have mentioned; because it cannot be asserted as against the holder of the bill of lading without paying him off; but the instant his claim is discharged it is exactly the same right as if there had been no security, as against the original purchaser and as against, in my opinion, every one claiming under him.

It was contended that when, after an indorsement by way of security, such as was here made to the Bank of Scotland, there has been a sale of the goods "to arrive" by the original purchaser, without any document of title, (a sale which passes to the sub-purchaser such equitable interest as his immediate vendor could convey,) that displaces the right of stoppage in transitu established by the cases of *In re Westzinthus* (1) and *Spalding* v. *Ruding* (2). From the beginning of the argument I was totally unable to understand how that could possibly be. The indorsement of the bill of lading to the Bank of Scotland can confer no title whatever upon the other persons to whom the original purchaser transfers such rights as he has. He can transfer no greater or better right than he has; and the right which he has is a right subject to a stoppage in transitu in all cases in which the right of stoppage in transitu remains in favour of the original seller of the goods. I put, therefore, aside the whole argument founded upon the existence of sub-purchasers. I assent entirely to the proposition that where the sub-purchasers get a good title as against the

(1) 5 B. & Ad. 817. (2) 6 Beav. 376; 12 L. J. (Ch.) 503.

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right of stoppage in transitu there can be no stoppage in transitu as against the purchase-money payable by them to their vendor; at all events, until I hear authority for that proposition, I am bound to say that it is not consistent with my idea of the right of stoppage in transitu that it should apply to anything except to the goods which are in transitu. But when the right exists as against the goods which are in transitu, it is manifest that all other persons who have, subject to that right, any equitable interest in those goods by way of contract with the original purchaser or otherwise, may come in, and if they satisfy the claim of the seller who has stopped the goods in transitu, they can of course have effect given to their rights; and I apprehend that a Court of justice, in administering the rights which arise in actions of this description, would very often find that the rights of all parties were properly given effect to, if so much of the purchase-money payable by the sub-purchasers were paid to the original vendor as might be sufficient to discharge his claim; and, subject, of course, to that, the other contracts would take effect in their order and in their priorities. I observe an illustration of that in the letter of the 5th of August 1878, written by Messrs. Orr & Harris, the respondent's solicitors, in which they say that they have been told that Messrs. Wiseman Mitchell & Co. have contracted for the sale of the salt upon certain terms; that they do not want to put them to inconvenience, and that therefore they will be quite ready, upon being paid what is due to them, to let that contract receive proper effect. That is merely a way of working out the right of stoppage in transitu, which is a right against the goods, and which, as I said before, could be in no way whatever affected or prejudiced by any dealings between the original insolvent purchaser and persons purchasing under him without any title founded upon an indorsement of the bill of lading for value received.

I put that argument entirely aside; and I then come to the question which has been argued by Mr. Bompas upon the special circumstances of this case. I assume that there was no stoppage in transitu effectually made until the 5th of August. I put, therefore, entirely out of the question whatever had been bonâ fide done before that time; and the question is whether there

was not, as against the cargo then remaining undelivered, an effectual stoppage in transitu. Now the facts stated in the second paragraph of the supplemental statement appear to me absolutely to exclude the notion of a constructive delivery of the whole cargo having taken place before the 5th of August; because it appears there that the sub-purchasers, to some of whom some small portions of the cargo had been delivered before the 5th of August, were all dealing separately from each other; each of them contracted to buy a certain quantity of salt, for which they paid Messrs. Wiseman Mitchell & Co.; they took receipts from them for their own portions; they "took those receipts to the vessel, and the quantities of salt for which they had respectively thus paid were then weighed out and delivered to them respectively in the presence and under the supervision of the master or other officer of the ship and the sircar or clerk of the consignees," without any arrangement as to the freight; from which it is apparent, that nothing could be more separate and distinct than the delivery of each parcel in that case; and if there were no more than those facts, the delivery of one parcel could not possibly operate as a delivery of the whole.

Then it was said, that it ought to be considered, on account of the terms of the letter of the 2nd of August 1878, that there was some constructive delivery of the whole cargo to the sircar or clerk of the consignees. That also appears to me to be a suggestion for which there is no warrant in the natural construction of the letter itself; a suggestion entirely unsupported by anything else, and really inconsistent with the fact that the delivery was not made by the sircar, but "in the presence and under the supervision of the master or other officer of the ship and the sircar or clerk." The sircar or clerk might be present too and might concur, but his concurrence could not mean that he had already become the possessor of the cargo, as if it had been taken out of the ship and delivered to himself.

The only other argument advanced by Mr. Bompas was founded upon the fact, stated in the first paragraph of the supplementary statement of facts, that the consignees indorsed the bill of lading (whatever that may be worth, I really will not stop to inquire), and delivered it to the captain. It was not indorsed to the

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captain for value, and there is nothing whatever to shew that your Lordships ought to infer that it had been indorsed to somebody else for value. We know that it had been indorsed for value to the bank, and we know the extent of their claim under it; and the bank have been satisfied or must be satisfied. The suggestion that it was indorsed, either to Messrs. Wiseman Mitchell Reid & Co. as persons who were under contract or who might be liable, or to any of the various sub-purchasers through them, is entirely without foundation; and neither in the original agreed statement of facts, nor in this supplementary agreed statement of facts, is any indorsement mentioned at all except the indorsement to the Bank of Scotland. It seems to me evident, that the Bank of Scotland sent the bill indorsed to them in order that their own security might be realized, and it then came into the hands of Messrs. Wiseman Mitchell & Co. (whether directly or through some intermediate agency is really not important) for that purpose; and it is not said, in this supplementary agreed statement of facts, that the indorsement which preceded the delivery of the bill of lading to the captain by those gentlemen was for any special purpose whatever which could give any new title, legal or equitable, to anybody who had it not before.

The result is that, under these circumstances, the case seems to me to be altogether within the ruling in the cases of *In re Westzinthus* (1) and *Spalding* v. *Ruding* (2), and therefore that the present appeal must be dismissed with costs.

LORD BLACKBURN:—

My Lords, I perfectly agree in the result that this appeal must be dismissed with costs. Originally in this case there was a statement of facts made in the Court of Bankruptcy, upon which there was an appeal to the Appeal Court; and on that statement of facts the ingenuity of counsel seems to have led the Court below to draw some inferences, which induced them, whilst giving judgment, as they have done, in favour of Mr. Falk, the present respondent, to intimate at the same time that they thought the case raised a question which had been raised in the

(1) 5 B. & Ad. 817. (2) 6 Beav. 376; 12 L. J. (Ch.) 503.

case of *Ex parte Golding, Davis, & Co.* (1), and that therefore they should give leave to appeal. When the case came here the first time, my noble and learned friend Lord Penzance thought that the statement of facts was not intelligible, and that it was desirable that it should be sent down to have the facts made clear; and now it appears that the original statement of facts was not only not intelligible but also not quite accurate; and we have now an amended and supplementary statement of facts, shewing what the facts of the case really were. Taking that statement it seems to me that the case is perfectly clear. We have no occasion to consider whether the case of *Ex parte Golding, Davis, & Co.* (1) was well or ill decided, because no point relating to it arises here.

It appears that Mr. Falk of Liverpool had sold to Mr. Kiell a quantity of salt, which was shipped on board a vessel bound for Calcutta; that Mr. Kiell accepted a draft drawn against that cargo; that bills of lading were made out, which were signed not as is usual by the master but by the shipowner himself, and that Mr. Kiell got those bills of lading. Now so far as that goes, standing there, nothing can be more thoroughly established than the law upon it. Mr. Falk having delivered the goods and taken a bill of exchange had no right whatever to meddle with those goods further, unless before the end of the transitus (I shall say a word presently as to what comes at the end of the transitus), Kiell the purchaser became insolvent and stopped payment, and then if Falk had stopped the goods in transitu he would have been revested in his rights as an unpaid vendor as against Kiell. It is pretty well settled now that it would not have rescinded the contract. But before the end of the transitus came, his right to stop the goods in transitu might be defeated by an indorsement upon the bill of lading to a person who gave value. In the present case there was such an indorsement and transfer of the bill of lading, but it was only an indorsement and transfer for a particular and limited purpose. It appears that Mr. Kiell in order to obtain an advance got Messrs. T. Wiseman & Co. of Glasgow, the correspondents and agents of Messrs. Wiseman Mitchell Reid & Co. of Calcutta, to make an advance in his favour by drawing a bill of exchange upon him; and to secure the

(1) 13 Ch. D. 628.

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payment of that bill of exchange the bill of lading was indorsed, and the Bank of Scotland who discounted or took that bill, became holders of the bill of lading for the purpose of protecting themselves. It was clearly a transfer for value to the Bank of Scotland, and as such, so far as that went, it defeated the right of the stoppage in transitu at law. But the unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee, or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop in transitu everything which was not covered by that pledge. That was settled and has been considered law, or rather equity, ever since the case of *In re Westzinthus* (1) and has been affirmed in *Spalding* v. *Ruding* (2); and I have no doubt it is very good law upon that point.

Here therefore the stoppage by Falk as unpaid vendor would revest in him his lien except so far as concerned the Bank of Scotland, unless something else had happened. Now what has happened? The argument of Mr. Bompas was this: First of all it appears that Messrs. Wiseman Mitchell Reid & Co., who were the persons to whom the goods were consigned (I do not understand whether they were purchasers, or merely agents for Kiell & Co.) sent over to their correspondents T. Wiseman & Co. of Glasgow a sale note, and then they forwarded it to Kiell & Co. in this letter: "Dear Sirs,—We enclose sale note of your cargo of salt ex *Carpathian* to arrive" and so on—the rest of the letter does not matter. So that at that time it appears that Messrs. Wiseman Mitchell & Co. had entered into a contract at Calcutta for a sale of the goods "to arrive." The date of that letter was the 17th of July, a fortnight or so before the ship actually did arrive at Calcutta. That, it was argued, put an end to the vendor's right to stop the goods in transitu, and pro tanto the equitable right to stop them in transitu which remained in Mr. Falk. I have endeavoured to understand on what ground it is supposed to put an end to it. No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage in transitu unless there were an indorsement of the bill of lading. Why any agreement to sell, unless it was made in such a way as to pass the right of property in the goods sold, should be sup-

(1) 5 B. & Ad. 817. (2) 6 Beav. 376; 12 L. J. (Ch.) 503.

posed to put an end to the equitable right to stop them in transitu I cannot understand. I am quite clear that it does not.

The next thing which was attempted to be argued was this. The Bank of Scotland, the holders of the bill of lading at Glasgow, forwarded the bill of lading in due course to their agents at Calcutta; and it is surmised that their agents at Calcutta must have been some persons different from Messrs. Wiseman Mitchell & Co. I infer that Messrs. Wiseman Mitchell & Co. were the people who acted as their agents in this transaction, but I do not think it matters whether they were or not. The Bank of Scotland sent the bill of lading to their agents, whether they were Messrs. Wiseman Mitchell & Co. or any one else. Those agents received that bill of lading well knowing (or at all events they ought to have known) that the Bank of Scotland had by virtue of this bill of lading a hold over the goods. They were entitled to see that the goods were not sold or disposed of in any way prejudicial to their lien, and, if they were sold, that the money, or enough of it to repay the Bank of Scotland and secure them, should pass through their hands or the hands of their agents; and I see nothing that happened afterwards which shews that they acted otherwise than in strict conformity with the duty thus cast upon them. It was argued that inasmuch as Messrs. Wiseman Mitchell & Co. had acted for Kiell & Co. in selling the goods, taking a del credere commission to secure that the people to whom they sold should pay the price, therefore they were persons who were entitled to have the bill of lading endorsed to them as a security. I am utterly unable to understand that argument, it is clear to me that they were not so entitled.

The next thing which was said was this. There was a little confusion in the statement here, but it is now said upon the amended statement of facts, that Messrs. Wiseman Mitchell & Co., who I cannot but think were the persons employed by the Bank of Scotland as their agents, did at some time (I do not exactly know when) indorse the bill of lading and shew it to the captain. I do not think that that comes to more than this, that they gave the captain complete notice, when he arrived at Calcutta, "We are the persons who have the legal right to the delivery of these goods, for we have the bill of lading, holding it

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under the Bank of Scotland, and consequently we are the persons entitled to the goods. You can deliver only to us without being responsible to us; if you deliver to us or with our sanction you will not be responsible to us." I can put no other meaning upon it.

Then it was argued that this amounts to a delivery of the whole cargo by the shipowner to Messrs. Wiseman Mitchell & Co., who from that time forward would be holders of the goods; the shipowner in whose physical possession, in the hold of whose vessel, the goods lay, being changed from holding the goods as shipowner, not having delivered the goods, into a warehouseman who was very inconveniently holding those goods in his ship as a warehouse. I think that that is an arrangement which might be made although it is not a very convenient one. The freight was not paid; but I think it is possible to make an arrangement by which, though the freight is not paid, the shipowner changes himself completely into a warehouseman instead of being a carrier or a shipowner; he alters his responsibilities altogether; and yet by arrangement or agreement retains a lien over the goods until the freight is paid. I think such a contract might be made. But when one is asked to say that such a contract was made, the non-payment of the freight is a very important element leading one to say that no such contract was made at all. In this case I cannot help thinking that no such contract was made, and there is no reason why we should hold that it was. The shipowner acted in the same way as if it had not been made and in no other way.

Then comes an argument which I really think is not tenable, and I should hardly mention it if it were not for the great importance of everything relating to the Factors Act and of every question touching it in the commercial world. It was argued that the recent statute 40 & 41 Vict. c. 39 s. 5, which says that the transfer of a delivery order or any other document of title shall put an end to an unpaid vendor's right to countermand that delivery order and to keep the goods, operates just to the same extent and under the same circumstances as in the case of a bill of lading for goods at sea. In order to make out that proposition reliance was placed upon this fact, that Messrs.

Wiseman Mitchell & Co., who were holders of the bill of lading, as I have already said, for the Bank of Scotland, wrote to the captain of the ship saying, "In order to save trouble we will not sign delivery orders for salt, but have written our sircar on board the above vessel to deliver salt to those men who produce cash receipts from our cashiers;" and by some strange process of reasoning it was said that the man who brought and shewed to the sircar of Messrs. Wiseman Mitchell & Co. a receipt for a sum of money paid to their cashier for the salt, was the holder of a document of title for the salt in such a way that the indorsement of it could put an end to the right of stoppage in transitu by Mr. Falk. Now in the first place the statute in question was never meant to have that effect. In the next place it is an abuse of language to call such a receipt as this a document of title in any shape.

Then the last and desperate attempt was to say that the stoppage in transitu was not until the 5th of August. I see that Lord Bramwell takes a different view of the law from what I had always understood it to be (1). I had always myself understood that the law was that when you became aware that a man, to whom you had sold goods which had been shipped, had become insolvent, your best way, or at least a very good way, of stopping them in transitu was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to be, and he might send it on; and I have always been under the belief that although such a notice, if sent, cast upon the shipowner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage in transitu; I have always thought that when the shipowner, having received such a notice, used reasonable diligence and sent the notice on, and it arrived before the goods were delivered, that was a perfect stoppage in transitu. Consequently I think that when notice was given to the shipowners (and although they had signed the bill of lading instead of the master signing it, I do not think that that makes

(1) 14 Ch. D. 455.

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any difference; I only mention it to say that it makes none) they were under an obligation to forward it with reasonable diligence, if they could, to the master.

What the shipowners did was this: on the 31st of July they sent a telegram (they waited two days, and they might have got into a scrape by that means), but they did send this telegram "Charterers *Carpathian* failed, unless bill of lading held for value, don't deliver." That was, as it strikes me, a sending forward of the notice to stop the goods in transitu: it was tantamount to saying, "We send to our captain the notice we have formally received ourselves;" and consequently I should say that the stoppage in transitu was complete on the 31st of July. But it is not necessary to decide that point, for it is clear enough that the goods were not then delivered, and nothing was done which could be called a delivery of the whole or any part of them until the 3rd of August, when a person brings one of these receipts for, I think, 1000 maunds of salt, or some small quantity of salt, and gets it delivered.

Then it is said that the delivery of a part is a delivery of the whole. It may be a delivery of the whole. In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole. I had always understood the law upon that point to have been an agreed law, which nobody ever doubted since an elaborate judgment in *Dixon* v. *Yates* (1) by Lord Wensleydale, who was then Parke J. The rule I had always understood, from that time down to the present, to be that the delivery of a part may be a delivery of the whole if it is so intended, but that it is not such a delivery unless it is so intended, and I rather think that the onus is upon those who say that it was so intended. Therefore the delivery of this particular parcel of salt was not a delivery of anything else.

(1) 5 B. & Ad. 313, 339.

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What we are now dealing with is the delivery of the salt which was delivered after the 5th of August, and which was quite sufficient to dispose of the whole sum now in dispute. We do not need to inquire what were the rights in any particular parcel of salt delivered on the 3rd of August. Supposing that those were misdeliveries no harm would happen, as quite enough remained to pay the Bank of Scotland and no dispute would arise about that; there is no complaint by anybody respecting it. The present question is with regard to the stoppage in transitu of the residue after an undoubted notice of stoppage in transitu was served upon the 5th of August. Is that subject to the rule that although the whole of the cargo could not be stopped because the bill of lading had been transferred to the Bank of Scotland, the interest which still remained in Kiell or in Kiell's assigns to whom he had sold it, or in anybody else except those who had become transferees of the bill of lading, might be stopped and might become vested in Falk the original vendor? I think there is no reason why it should not; and that being so, the judgment of the Court below is right and ought to be affirmed.

LORD WATSON:—

My Lords, it is not necessary for me to say much in regard to this case, which appears to me to involve, when rightly understood, no question of law whatever. When the case was first presented to the House there was a very considerable amount of haze hanging over the statement of what had taken place in Calcutta with regard to the bill of lading which had been signed by the shipowners, and subsequently indorsed to the Bank of Scotland for an advance. It was then stated that on the 30th of July 1878 the consignees had presented that bill of lading to the agents of the ship and had received in exchange delivery orders directing the master to make delivery to the persons therein named, and that the consignees had given over those delivery orders to the parties therein named, who by virtue of them had each obtained the parcel of salt mentioned in his delivery order. It now appears, on further inquiry, that these statements were made under a misapprehension.

I agree with your Lordships as to the result to which you will

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come in point of fact; and arriving at that result, it is quite impossible for me to hold, notwithstanding the very ingenious argument which has been addressed to us by the learned counsel on behalf of the appellant, that the case is not directly ruled by the cases of *In re Westzinthus* (1) and *Spalding* v. *Ruding* (2). There is no occasion for your Lordships to consider the effect or the propriety of the judgment of the Court of Appeal in the case of *Ex parte Golding, Davis, & Co.* (3). The law laid down in the cases of *In re Westzinthus* (1) and *Spalding* v. *Ruding* (2) is very well established and very clear law, and in my opinion it directly applies to the facts of this case as they have now been ascertained upon further inquiry.

LORD FITZGERALD:—

My Lords, I concur in the decision which has been announced by the Lord Chancellor. One of the questions before your Lordships' House is, whether the transit of the goods had ended before the 5th of August 1878 when the vendor's notice to stop was delivered to the master of the *Carpathian* at Calcutta. I accept the date of the 5th of August as it renders it unnecessary to consider the effect of the prior notice given in Liverpool. "Transit" embraces not only the carriage of the goods to the place where delivery is to be made, but also delivery of the goods there according to the terms of the contract for conveyance. Thus in this case "transit" means the conveyance of the goods to Calcutta, and their delivery "at the port of Calcutta" by the carrier, according to the terms of the charterparty and bill of lading, into the actual or constructive possession of the consignee. This seems to me to raise a question of fact as to which, if there was any open for controversy in the Court below, there is none now when we take into consideration the additional statement of facts ascertained on the inquiries directed by your Lordships' House at the opening of this appeal.

Upon the additional facts modifying the original statement in the case, it now appears that the freight which was to be paid

(1) 5 B. & Ad. 817. (2) 6 Beav. 376; 12 L. J. (Ch.) 503.
(3) 13 Ch. D. 628.

"on the right delivery of the cargo agreeable to bill of lading at a tonnage rate on the quantity delivered" "in full of all port charges," was paid in two payments, the first on the 22nd of August 1878, and the second on the 3rd of September 1878. It does not appear that the shipowners had on or before the 5th of August given up their lien for freight. No delivery orders had been given by the shipowners to the consignees or to the sub-purchasers, of whom I infer there were several. The course pursued by Wiseman Mitchell & Co., who stood in the position of consignees, was to indorse the bill of lading and deliver it to the captain, with the letter of the 2nd of August 1878, and then as each sub-purchaser paid Wiseman Mitchell & Co. for the quantity he had purchased he got a receipt, took it to their clerk on board the ship, and his quantity was weighed out and delivered to him over the ship's side under the supervision of the master. The deliveries commenced on the 2nd of August, when 1000 maunds were unshipped and delivered. No delivery took place on the 4th, and on the 5th of August 2800 maunds were delivered. The whole quantity on the ship was 49,195 maunds, so that assuming that the delivery of the 5th took place before the notice to stop was delivered, there remained then on the ship in charge of the carrier 45,395 maunds.

It seems to me that at the time of the delivery of the notice to stop, that portion of the cargo represented by the 45,715 maunds of salt was still in transit and liable to be stopped, and that there had been no actual delivery of the whole, and that the partial deliveries of the 2nd and 5th of August to different sub-purchasers of lots do not indicate any constructive delivery of part as representing the whole cargo, or give rise to any question of that character.

The preceding statement of facts negatives any question of intention that a delivery of part should amount to a delivery of the whole. This seems to me to determine the whole controversy, for if there was nothing more there could be no doubt of the unpaid vendors' equity to stop the surplus after payment of the demands of the bank. Another question was however raised, viz. whether the sub-sales of the whole cargo before the arrival of the *Carpathian*

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at Calcutta put an end to the right of the unpaid vendor to stop the goods or defeated his equitable title to be paid out of the surplus of the unpaid purchase-money. The facts again seem to prevent any such question arising.

The argument of the present appellant in the Court below was that the sub-sales amounted to a complete transfer of the property in the goods both legal and equitable, and that there was by the attornment of the master a complete delivery to the sub-purchasers before notice to stop was given, and that in such a state of facts it had never been held that the vendor had any right against the sub-purchaser's purchase-money. The allegation of an attornment by the master was based on par. 19 of the statement of facts, but that has been completely displaced by the additional statement, from which we learn that no delivery orders were signed by the master or by the agents (Steele & Co.), nor were any delivery orders given by Wiseman Mitchell & Co. representing the consignees.

The shipment in Liverpool was in bulk 1882 tons of salt, "the ship not accountable for natural wastage," and each purchaser seems to have purchased not any specific lot but so many maunds to be weighed out to him ex ship.

I infer from the amended statement also that the money to be paid by the sub-purchasers for the 45,395 maunds which remained on the ship after the deliveries of the 5th of August had not been paid to Wiseman Mitchell & Co., or at all before the notice to stop. The foundation, therefore, on which the appellant here rested his argument in the Court below is entirely removed.

Your Lordships ought to give full effect to the equitable principles on which the right of stoppage in transitu rests. It is a right founded on reason, and never works injustice. In affirming the decision of the Court below your Lordships merely decide that the claim of the unpaid vendor against the surplus produce of his own goods, after providing for all prior rights, is superior to that of the creditors of Kiell, who had not paid for the goods.

Confining myself to the facts of the case, I refrain from expressing any opinion how far a bonâ fide absolute sub-sale for cash made whilst the goods were at sea, and without notice of the

claim of the unpaid vendor, may or may not affect the right of stoppage in transitu, though the sub-sale be unaccompanied by an indorsement and delivery of the bill of lading to the sub-vendee. H. L. (E.) 1882 KEMP v. FALK.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 10th July 1882.

Solicitors for appellant: *Ashurst, Morris, Crisp & Co.*

Solicitors for respondent: *Field, Roscoe, & Co. for Bateson, Bright, & Warr, Liverpool.*

[HOUSE OF LORDS.]

GLYN MILLS CURRIE & CO. . . . APPELLANTS; H. L. (E.) 1882 *Aug.* 1.

AND

THE EAST AND WEST INDIA DOCK COMPANY . . . . . } RESPONDENTS.

Sale of Goods—Bill of Lading—Merchant Shipping Act, 1862 (25 & 26 *Vict. c.* 63) *ss.* 66–78—*Warehouseman, Liability of—Conversion.*

When goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee "or his assigns, the one of which bills being accomplished, the others to stand void," the master, or the warehouseman who has the custody of the goods under the Merchant Shipping Act 1862 ss. 66–78, is justified in delivering to the consignee on production of one part, although there has been a prior indorsement for value to the holder of another part; provided the delivery be bonâ fide and without notice or knowledge of such prior indorsement.

Goods having been shipped for London consigned to C. & Co. the ship-master signed a set of three bills of lading marked "First," "Second," and "Third," respectively, making the goods deliverable to C. & Co., or their assigns, freight payable in London, the one of the bills being accomplished, the others to stand void. During the voyage C. & Co. indorsed the bill of lading marked "First" to a bank in consideration of a loan. Upon the arrival of the ship at London the goods were landed and placed in the custody of a dock company in their warehouses; the master lodging with them notice under the Merchant Shipping Act 1862 s. 68 &c. to detain the cargo until the freight should be paid. C. & Co. then produced to the dock company the bill of lading marked "Second" unindorsed, and the

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dock company entered C. & Co. in their books as proprietors of the goods The stop for freight being afterwards removed, the dock company bonâ fide and without notice or knowledge of the bank's claim delivered the goods to other persons upon delivery orders signed by C. & Co.:—

Held, affirming the decision of the Court of Appeal, that the dock company had not been guilty of a conversion, and that the bank could not maintain any action against them.

Fearon v. *Bowers* (1 H. Bl. 364) reflected on.

APPEAL from the judgment of the Court of Appeal (1) reversing a judgment of Field J. (who tried the case without a jury) in favour of the appellants (2). The facts (which are set out in the judgments of Field J. (2) and Brett L.J. (1) are shortly as follows:—

Sugar was shipped in Jamaica and consigned to Cottam Mortan & Co., merchants in London. On April 16 1878 the master signed a set of three bills of lading marked respectively "First," "Second," and "Third," making the sugar deliverable to Cottam & Co. or their assigns, freight payable in London. Each bill contained the clause, "In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." During the voyage Cottam & Co. on the 15th of May 1878 indorsed in blank the bill marked "First" to the appellants, London bankers, in consideration of a loan. The ship arrived at London on the 27th of May, and on the 28th the master landed the sugar and deposited it with the respondents in their docks, lodging with them a copy of his manifest in a printed form supplied by the respondents. In the manifest the names of Cottam & Co. appeared as consignees and as entering the goods. At the foot was a printed clause: "I declare the above to be a true copy of the manifest of the cargo of the above ship, and hereby authorize the East and West India Dock Company to deliver the same to the consignees as above or to the holders of the bills of lading." This was signed by the master, the words "the consignees as above or to" being first struck out. On the 29th the master lodged with the respondents a written notice "pursuant to 25 & 26 Vict. c. 63 s. 68 &c." to detain the sugar till payment of the freight. On the 31st Cottam & Co. brought the bill marked

(1) 6 Q. B. D. 475. (2) 5 Q. B. D. 129.

"Second," not indorsed, to the respondents who entered Cottam & Co. in their books as proprietors of the sugar. On the 7th of June, the freight having been paid by Cottam & Co. the stop for freight was removed. In July the respondents, bonâ fide and without notice or knowledge of any claim by the appellants, delivered the sugar to Williams & Co. who held delivery orders signed by Cottam & Co. Cottam & Co. having gone into liquidation in August the appellants demanded the sugar from the respondents, producing the bill of lading marked "first." The respondents not being able to deliver, the appellants brought this action against them claiming damages for the value of the sugar.

July 3, 4, 6. *Sir F. Herschell* S.G. and *Benjamin* Q.C. (*Barnes* with them) for the appellants:—

The indorsement of the "first" bill of lading gave the appellants a legal title to the goods: made them "holders of the bills of lading" and prevented any other persons being holders by any dealings with the "second" or "third" bill. The unloading and delivery to the dock company were strictly under the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63). The shipowner would not have been discharged unless he delivered to the true owners, the appellants; but even if he would the respondents would not. By 18 & 19 Vict. c. 111 ss. 1, 2, the appellants could sue on the contract and could be sued by the shipowner for freight. *Fearon* v. *Bowers* (1) so far as it affects the present question was not approved or disapproved by Lord Loughborough in *Lickbarrow* v. *Mason* (2), but was approved by Dr. Lushington in *The Tigress* (3). If it proves anything it proves too much, viz. that delivery to a holder of any one of the set *with notice* of the holders of the others by the master will discharge him. The only other authority on the question whether delivery to the holder of one of several bills of lading discharges the shipowner is the dictum of Lord Westbury in *Barber* v. *Meyerstein* (4): and see Abbott on Shipping, 6th ed. p. 286, pt. 4, ch. 3, s. 5. The clause "one of which being accomplished the others to stand void" means "rightfully accomplished." It cannot mean accomplished by delivery to a person without title. There can be only one "assign" in law and delivery

(1) 1 H. Bl. at p. 364.
(2) 1 Sm. L. C. 8th Ed. p. 782.
(3) 32 L. J. P. & A. 97.
(4) Law Rep. 4 H. L. p. 336.

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to any person wrongfully pretending to be an assign is not delivery to an assign. A warehouseman holds not by contract but by force of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63 ss. 66-77) and holds for the true owner. As soon as the stop for freight was removed the contract of affreightment was gone. The warehouseman has more power than the shipowner: he can sell after ninety days. The striking out the words "to the consignees as above or to" out of the manifest was notice not to deliver to consignees except in their character as holders of the bills of lading. There was no authority to deliver except as above. The respondents were not bailees within any of the classes in *Fowler* v. *Hollins* (1). The only case where ostensible ownership is recognised is a sale in market overt.

Sir H. Giffard Q.C. and *Cohen* Q.C. (*Pollard* with them) for the respondents:—

The appellants having recognised Cottam & Co. as entitled to deal with the goods and as consignees and as their agents cannot repudiate their own acts. If indeed the master had had notice he might be liable in trover. The practice as was said by Bramwell L.J. (2) is for the master to deliver to the person who first presents a bill of lading. The holder of a bill of lading ought to watch the ship and upon arrival present it, in view of possible claims for demurrage. For those claims the shipper would be primarily liable: and secondarily the indorsee of bills of lading to whom the contract is transferred by indorsement. If the holder of bills of lading is not there to receive the goods the master has no reason to suspect, or to ask questions. As to reasonable grounds for suspicion see *Jones* v. *Smith* (3). If such questions must always be asked it would much impair the value of negotiable securities. The master had here no right or reason to suspect. The course of business between Cottam & Co. and the dock company was to shew only one bill of lading. The Merchant Shipping Act 1862 does not provide for delivery of goods by a dock company. If the master would not be liable, neither would the dock company be. If the respondents fairly believed Cottam & Co. to be owners they are not liable in trover: nor if

(1) Law Rep. 7 H. L. pp. 766-8. (2) 6 Q. B. D. 492.
(3) 1 Hare, 43.

they delivered to the ostensible owners which Cottam & Co. were, having a bill of lading and having been allowed to interfere with the goods.

Sir F. Herschell S.G. in reply:—

There was no relation between Cottam & Co. and the dock company except as arising from statute and from the bill of lading. At the trial it was never suggested that the dock company were bailees of Cottam & Co. The goods were deposited by ship, and the dock company are in no better position than the shipowner. The appellants were not negligent. It is not the business of bankers to watch ships and stop delivery. If it were so held it would impair the negotiability of bills of lading. No usage or custom was proved to deliver to whoever presents one of a set of bills of lading: though there may be a practice. But people often do things subject to risk of loss if there be fraud. Such usage could not be proved unless it were shewn that the master delivered to a wrong person and yet was held not liable. The clause "the one of which bills &c." means only that the master shall not be liable to hand over the goods three times; and was not inserted with a view to such a case as the present. "Accomplished" means delivery in pursuance of the contract. Till the freight is paid the dock company hold for the shipowner to preserve his lien: when the stop for freight is removed the shipowner is out of the question for he has discharged himself by delivery to the dock company, and they hold for the true owner and have a lien against him for warehouse charges. When they sell they must hand the proceeds to the true owner. When the stop for freight is removed the bill of lading ceases to be "a living instrument"—*Barber* v. *Meyerstein* (1)—and the dock company hold only for the true owner.

The House took time for consideration.

Aug 1. LORD SELBORNE L.C.:—

My Lords, having had the advantage of seeing in print the opinion of my noble and learned friend, Lord Blackburn, in this

(1) Law Rep. 4 H. L. 317, 335.

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Lord Selborne, L.C.

case, with which I agree, I shall content myself with making a very few observations.

Every one claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner. It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that "the one of these bills being accomplished the others are to stand void." It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a bonâ fide delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case when the original party to a contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice indeed that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to inquire whether there has in fact been an assignment or not; and, in the absence of such usage, I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry. This conclusion is in accordance with the authorities which will be referred to by my noble and learned friend, and also with the principle of such decisions as those of your Lordships' House in *Shaw* v. *Foster* (1) and *London and County Banking Co.* v. *Ratcliffe* (2).

It was admitted, in the argument at the bar, that the right of

(1) Law Rep. 5 H. L. 321. (2) 6 App. Cas. 722, 729.

the shipowner to deliver to the first person who claimed it, by virtue of an indorsed bill of lading (the shipowner having no notice of any better title) could not be denied, although such person might not, in fact (if there had been a prior indorsement of another part of the bill of lading to another person for valuable consideration), have the legal title to the goods. It is clear, therefore, that the shipowner may be discharged by a bonâ fide delivery, under the terms of his contract with the shipper, to a person who is not the true owner; and I think there is no sufficient reason for refusing him the benefit of that contract, when the part of the bill of lading on which he makes a like bonâ fide delivery is not indorsed.

I have spoken of the "shipowner" throughout, because, in my opinion, the position of the dock company for the purposes of the present question is not in any respect different from that of the shipowner.

The appeal, therefore, ought, in my opinion, to be dismissed with costs.

EARL CAIRNS:—

My Lords, I also am of opinion that this appeal must fail. There is no necessity for going at length into any of the facts of the case, for on the facts there has really been no dispute; but I think it is desirable to state at the outset that the opinion which I have formed is that the respondents, the dock company, are under no higher liability than the shipowner himself would have been, and on the other hand that they are not under any lower or less liability, and that the case may be looked upon, in a general point of view, as if the delivery had been, not by the dock company, but by the shipowner himself. I think that that is satisfactory, because the opinion which your Lordships will express will be an opinion applicable generally to the case of shipowners, and will not be founded upon any special circumstances connected with the present case.

So also it appears to me that neither the appellants nor the respondents can be said to be guilty of any laches whatever, much less of any want of good faith. It is quite clear that Cottam & Co. produced to the dock company, whom I will suppose to be

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the shipowner, one part of the bill of lading, and on the production of that part the delivery of the goods took place.

That leads me to consider what is the position, with regard to a bill of lading of this kind, of a shipowner at an out-port? A shipowner or his agent at a distant port, undertakes to carry certain goods; he receives the goods upon a contract of affreightment; he or his servant, the master of the ship, gives a bill of lading. I will suppose, in the first place, that he gives a bill of lading consisting of only one part. Now the contract in a bill of lading of that kind is, that the shipowner will deliver to the consignee or to his order or to his assigns the goods which are undertaken to be carried. Of course in a contract of that kind it is obvious that questions of some difficulty and some embarrassment may arise. The assumption is that the person who ships the goods, or the consignee, will not necessarily be the person to whom the delivery is to be made. The delivery is to be made to him or, in the alternative, to his order or to his assigns. Questions, it is obvious therefore, may arise. Has the consignee ordered the delivery to be made to any other person? Has he assigned the contract or the property in the goods? If he has, to whom has he assigned it? Are there more assigns than one, and if so, in what order of assignment do they stand?

Now if there were only one part of the bill of lading the process, as it appears to me, would be an extremely simple one. The bill of lading would be the title deed, and whoever came to the shipowner or to the master of the ship and demanded delivery of the goods, in whatever right he claimed—whether as the original consignee or as a person coming by order of the consignee, or as the assign of the contract or of the property,—in any of those cases all that the master of the ship (who is not a lawyer and has not, perhaps, a lawyer at his side) would have to say is, "Where is your title deed? Produce it." If he had not a title deed the master would be entitled to say "I will not deliver these goods to you." If, on the other hand, he had the bill of lading, and if there was no fraud and no notice of any different title brought home to the master, all that the master would have to do would be to deliver to the person having that title deed, and then the master would be free from any responsibility.

But the confusion, the difficulty, and embarrassment have arisen from there not being what I have supposed, one title deed, but there being more than one, in this case three parts of the title deed, that is to say of the bill of lading. I asked the question, For whose benefit is it that there are those three parts? Certainly not for the benefit of the shipowner, or for the benefit of the master. To them the presence of three parts of the bill of lading is simply an embarrassment. It is for the benefit of the shipper or of the consignee. I do not stop to inquire whether to them it is really a benefit or whether at this time of day (many if not all of the reasons for having bills of lading in parts being very much modified) it would not be better for every one that there should be only one part; that is a question for the mercantile world to consider. It is quite sufficient for me to say that it is certainly not for the benefit or for the convenience of the shipowner or of the master that there are three parts of the bill of lading.

Then what has the shipowner to do? The shipowner has to protect himself from that which is liable to cause difficulty or embarrassment to him, and the way in which as it appears to me he does protect himself is by stating that although "the master or purser hath affirmed to three bills of lading"—that is to say has signed three bills of lading "all of the same tenour and date"—yet notwithstanding that fact "one of these bills of lading being accomplished the others shall stand void," which I understand to mean that if upon one of them the shipowner acts in good faith he will have "accomplished" his contract, will have fulfilled it, and will not be liable or answerable upon any of the others. If one is produced to him in good faith he is to act upon that and not to embarrass himself by considering what has become of the other bills of lading. That appears to me to be the plain and natural interpretation of these words, having regard to the purpose for which they are introduced. I put it to the learned counsel who argued the case whether he could suggest any other explanation of these words which would give them a rational meaning, but I could not learn from the bar that there was any other explanation that could be suggested.

That being the case, there has occurred exactly one of those instances in which the shipowner requires protection. I use the

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term "shipowner" because for this purpose I assume that the dock company is in the position of the shipowner. He has had, in good faith, one of the parts of the bill of lading presented to him—he has had no notice of any title at variance with that—he has acted upon the bill of lading so produced, and it appears to me that if he or those who stand in his place, are not to be protected, the final clause might as well be struck out of the bill of lading.

It is said that this will cause inconvenience to those who advance money upon bills of lading. I do not think that it need do so in the least. There are, at all events, three courses open to them, either of which they may take. The mercantile world may, if they think right, alter the practice of giving bills of lading in more parts than one. That would be one course which might be taken. But even supposing that the bill of lading is in more parts than one all that any person who advances money upon a bill of lading will have to do, if he sees, as he will see, on the face of the bill of lading, that it has been signed in more parts than one, will be to require that all the parts are brought in, that is to say, that all the title deeds are brought in. I know that that is the practice with regard to other title deeds, and it strikes me with some surprise that anyone would advance money upon a bill of lading without taking that course of requiring the delivery up of all the parts. If the person advancing the money does not choose to do that, another course which he may take is, to be vigilant and on the alert and to take care that he is on the spot at the first arrival of the ship in the dock. If those who advance money on bills of lading do not adopt one or other of those courses, it appears to me that if they suffer, they suffer in consequence of their own act.

Whether that be so or not, it seems to me that the dock company, standing in the position of the shipowner, require to be protected,—that they have done that which it was their positive duty to do, and that the judgment of the Court below ought to be affirmed.

LORD O'HAGAN:—

My Lords, I also have had the advantage of reading the opinion of my noble and learned friend (Lord Blackburn) and I feel that

I cannot do better than follow the example of my noble and learned friend on the woolsack, by accepting its conclusions, and the reasons on which they have been based. Its statement of the facts is lucid, accurate and exhaustive, and its exposition of the law presents with remarkable precision and succinctness the view, which after serious consideration I have adopted in common, I believe, with all your Lordships.

I cannot say that I have not had some hesitation in the adoption of it. The conflict of decision between able Judges of equal authority and equally divided, the diversities of reasoning even between those who in the result have agreed, the want of any recent evidence as to the usages of commercial men in these countries with reference to bills of lading, and especially such dealings with them as are the subject of our consideration, made me doubtful for a time; but I am satisfied upon the whole that the ruling of the Appellate Court was right and ought to be upheld.

The defendants got possession of the goods from the captain, not by virtue of any contract or bailment, as has been contended at the bar, but under the provisions of the statute and subject to the liabilities created, and the duties imposed, by it. And amongst them was the obligation to deliver them to such person or persons, and on such conditions, as the statute should be held to have indicated and required to warrant delivery by the shipowner or the master. On the payment of the freight and the removal of the stop-order it seems to me that they were bound, as he would have been, to deliver them to the person making presentment of the bill of lading. I think, in the absence of express decision, the weight of authority having relation to it sustains the judgment of the Court below. I think that usage, so far as we have any means of ascertaining it, is inconsistent with the plaintiffs' claim—and, I think, finally, that principle and policy, and the necessities of mercantile affairs are quite in favour of the action of the defendants.

As to authority there is none which deals with the precise state of facts before us. The case of *Fearon* v. *Bowers* (1) was different from this, as there the person yielding up the goods was the captain of the vessel, and not the warehouseman, and he had to

(1) 1 Sm. L. C. 8th Ed. 782.

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choose between two claimants; whereas in the present case there was only one claimant known to the defendants, and they had no notice of any other. I concur in the view of Lord Tenterden that the law should not commit a discretion to the captain of a ship so unreasonably large and so capable of being put to evil uses. But that case could scarcely have been entertained at all, if the lesser power to hand goods to the holder of a bill of lading, bonâ fide and without knowledge of any adverse title, had not been assumed to be warranted by usage and by law. I do not think the approval of that case in *Lickbarrow* v. *Mason* (1) by Lord Loughborough and Mr. Justice Buller can be held to have established it in all its dangerous extent. The circumstances they were considering did not necessitate the minute examination or the complete rejection or adoption of its doctrine. But this, at least, may be said, that unless the holder of a bill of lading was then understood to be entitled to receive the goods, of which it guaranteed the delivery, we can scarcely conceive that the larger proposition would not have been at once repudiated. And in the case of *The Tigress* (2) before Dr. Lushington when he refers to the case of *Fearon* v. *Bowers* (3) he does not expressly adopt it, in its fulness, as he did not need to do for the purpose of his judgment: but confines himself to approval of it, so far as it may be applied in the conditions of the case before him. He says of *Fearon* v. *Bowers* (3): "This case is a stronger one than the present, for here it appears that there had been no presentment at all by the vendee of his bill of lading. It is clear therefore, that the master would at least have been justified in delivering to the plaintiffs as holders of the first bill of lading presented: and it must be remembered that the bills of lading contain a proviso that the first being accomplished the others shall stand void." Plainly Dr. Lushington considered the first presentment sufficient to entitle the holder to the delivery of the goods, and held that the delivery on such presentment was the "accomplishment," within the proper meaning of the instrument, on which the others should "stand void." And accordingly the case is simply headed "A master is justified in delivering the goods to the holder of the

(1) 1 Sm. L. C. 8th Ed. 782, 792. (2) Brown. & Lush. Ad. Ca. 38, 44.
(3) 1 H. Bl. 364.

first bill of lading presented," which is the case of the defendants who stand in the master's place. It seems to me that taking these cases together, they constitute a reasonable body of authority in support of the judgment of the Court below.

Then, as to the practice in such matters, we have no parol testimony about it, nor any proof at the particular trial of this case: but we have the statement of the Chief Justice (Lee) a long time ago that a usage existed then which would have fully warranted the course of the defendants; we have his direction of a verdict founded on the proof of it; we have Lord Tenterden suggesting the limitation of the rule so acted on by the Chief Justice, but not denying its existence or disapproving of it save as to its excessive operation; and we have the uncontradicted assertion of a living Judge of great experience in mercantile cases, that it is still the "undoubted practice" to deliver "without inquiry" to the holder of a bill of lading (1).

And lastly that principle and policy are in favour of such a practice appears to me reasonably plain, when we consider how impossible it would be for a master in a multitude of cases to institute satisfactory inquiry as to the transactions dehors the part produced to him, which might qualify or destroy the right to the possession of the goods. The fact that so very few complaints of misdelivery are recorded during a century and more, either on the score of error or of fraud, demonstrates how little practical evil has come of the usage; whilst, if it had not prevailed, the prompt and unfettered action required by the needs of commerce might have been much restrained in very many instances.

It is always painful to decide when the decision must necessarily injure one of two blameless parties; but in this case the plaintiffs who had the property, which secured the advance, undoubtedly vested in them by the indorsement of the bill of lading, have never lost their title to that property or the right to recover it, if wrongfully taken from them. If they had acted as the bank did in *Barber* v. *Meyerstein* (2) they would have run no risk of loss. They might have taken other precautions (such as getting all the three parts of the bill of lading) with a like result, and they are not now precluded from seeking redress from any one who may

(1) 6 Q. B. D. 492, per Bramwell L.J. (2) Law Rep. 4 H. L. 317.

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illegally have obtained possession of their goods. But the defendants, who have done nothing malâ fide, who have acted, as I conceive, according to usage and within their right, should not be made answerable for an error for the consequences of which they are not, in my opinion, legally or morally responsible.

I think that the appeal should be dismissed with costs.

LORD BLACKBURN :—

My Lords, this is one of the cases in which difficulty arises from the mercantile usage of making out a bill of lading in parts.

There is since the decision of *Lickbarrow* v. *Mason* (1), now nearly 100 years ago, no doubt that, before there was any statute affecting the matter, the bill of lading was a transferable document of title, at least to the extent as was said by Lord Hatherley in *Barber* v. *Meyerstein* (2), that, "when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property is the property itself." And the very object of making the bill of lading in parts would be baffled unless the delivery of one part of the bill of lading, duly assigned, had the same effect as the delivery of all the parts would have had. And the consequence of making a document of title in parts is, that it is possible that one part may come into the hands of one person who bonâ fide gave value for it under the belief that he thereby acquired an interest in the goods, either as purchaser, mortgagee or pawnee, and another part may come into the hands of another person who, with equal bona fides, gave value for it under the belief that he thereby acquired a similar interest. This cannot well happen, unless there is a fraud on the part of those who pass the two parts to different persons such as would in most cases bring them within the grasp of the criminal law, and from the nature of the transaction such a fraud must speedily be detected; the cases, therefore, in which it occurs are not very frequent. Nevertheless, it does at times occur, and there are cases in our Courts, where the rights of the two holders have had to be considered. The

(1) 1 Sm. L. C. 8th Ed. p. 753. (2) Law Rep. 4 H. L. 326.

last of those was *Barber* v. *Meyerstein* (1), in this House; and so far as that decision extends, the law must be taken to be settled.

I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only which should be the sole document of title, and taking as many copies, certified by the Master to be true copies, as it is thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out. So long as this practice continues, it is of vast importance not to unsettle the principles which have been already settled; and when a new case has to be decided it is desirable to be very cautious as to what principles are applied.

The facts in the present case bear in many respects a close resemblance to those in *Barber* v. *Meyerstein* (1), but they are not quite the same; and the question, on the solution of which in my opinion the decision in the present case ought to depend, did not arise in *Barber* v. *Meyerstein* (1), though Lord Westbury did in that case mention it when he says (2): "There can be no doubt therefore that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party; but

(1) Law Rep. 4 H. L. 317. (2) Law Rep. 4 H. L. p. 336.

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although that may be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods." That point did not arise, and Lord Westbury did not express any opinion on it. He only mentions it so as to shew that it was not decided either way.

In the present case Cottam & Co., on the 15th of May 1878 applied in writing to Glyn & Co., bankers in London, for an advance, on the security of certain bills of lading. From the terms of the application it is plain that the bankers were to have the property, with a power of sale, in the goods represented by the bills of lading, so far as was necessary to secure their advance, and that, subject thereto, Cottam & Co. were to remain owners of all the rest of the interest in the goods and might do, as owners, everything consistent with the property thus given to the bankers. I do not think it necessary to express any opinion on a question much discussed by Brett L.J., I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.'s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowners' lien, and were entitled to maintain an action against anyone who, without justification or legal excuse, deprived them of that right.

Cottam & Co. delivered to the bankers, as part of their security, a bill of lading for twenty hogsheads of sugar by the *Mary Jones*, shipped by Elliot in Jamaica, deliverable to Cottam & Co. or to their assigns, indorsed in blank by Cottam & Co. This bill of lading bore on the face of it, distinctly printed, the word "first," and at the end had the usual clause "In witness whereof the master of the ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." There could be no doubt therefore that the bankers had distinct notice that there were two other parts of the bill of lading. It appears in *Barber* v. *Meyerstein* (1) that in a similar transaction the Chartered Mercantile Bank, before making a similar advance to Abraham, had insisted on having all three parts of the bill of

(1) Law Rep. 4 H. L. 317.

lading delivered to them, and so no doubt might Glyn & Co. have done here; but I infer that Abraham, who soon after was guilty of a very gross fraud, was not a person who could ask any reliance to be placed on his honesty; and that where the person depositing the bill of lading is of good repute, a banker would rather run the risk, in most such cases nominal, of the depositor having committed a fraud, than the risk of offending a good customer by making inquiries which might be construed as implying that they thought him capable of committing a gross fraud. However this be, it appears that Glyn & Co. made no inquiry, and were content to take the one part. And as in fact neither of the other parts had been transferred, the security which Glyn & Co. had was not impeached by such a prior transfer. And as the *Mary Jones* was then at sea, the question mainly discussed in *Barber* v. *Meyerstein* (1) does not arise in this case.

The *Mary Jones* arrived on the 27th of May, and the next day the master reported her at the Customs, and the goods were there, for Customs purposes, entered by Cottam & Co. as owners. All this was quite right, and did not require the production of any bill of lading; it could and ought to have been done as well if the other parts of the bill of lading had been delivered to Glyn & Co., or had remained locked up in the desk of the shipper Elliot in Jamaica.

The master appears to have been in a hurry to get his vessel empty, and to have resolved to avail himself of the provisions of the Merchant Shipping Act 1862 sects. 66 to 78. He had not, in strictness, any right to do so till default had been made in making entry, which never was the case at all, or till default had been made in taking delivery within seventy-two hours after the report of the ship, which would not in this case be till the 31st of May. But the master, apparently being in a hurry, on the 28th of May, prepared and signed a notice to the East and West India Docks to "detain all the undermentioned goods which shall be landed in your docks, now on board the ship *Mary Jones* from Jamaica, whereof I am master, until the freight due thereon shall be duly paid or satisfied, in proof of which you will be pleased to

(1) Law Rep. 4 H. L. 317.

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receive the directions of James Shepherd & Co. The whole cargo as per bills of lading." This stop was lodged with the dock company on the 29th of May.

The dock company, it appears, were in the habit of requiring the master to sign an authority at the foot of a copy of the manifest. And in this case the copy manifest was signed and lodged on the 28th of May. It is not necessary to inquire what would have happened if, before the seventy-two hours had expired, a duly authorized person had tendered the freight and demanded delivery, for no such thing occurred. And I think, as soon as the seventy-two hours had elapsed, the dock company held the goods under the provisions of the Act, just as much as if they had not been landed till then. The counsel for the respondents wished your Lordships to draw the inference of fact that all this must have been done, not under the provisions of the Act, but by virtue of some agreement to which Cottam & Co. were a party. I do not see any evidence of this; and looking at the manner in which the admissions were made, so as to apply not only to the *Mary Jones* but to two other ships mentioned in the 6th and 11th paragraphs of the statement of defence, I should, if necessary, draw the inference that it was not the fact.

Then on the 31st of May, on which the seventy-two hours had expired, Cottam & Co. brought down and shewed to the dock company a bill of lading with the word "second" distinctly printed on the face of it, and in every other respect precisely similar to the bill at that time in the hands of Glyn & Co. It was not indorsed. The clerk of the dock company entered in the books of the company that Cottam & Co. were the proprietors of the goods, and marked the bill of lading with his initials and the date, so as to shew that he had seen it, and returned it to Cottam & Co. It was proved, what I think would have been inferred without proof, that after this the dock company would, according to their ordinary practice, have delivered the goods when the stop for freight was removed to the order of Cottam & Co., unless, in the meantime, they had got notice that another bill of lading was, as the witness says, out.

It appeared in *Barber* v. *Meyerstein* (1) that in the case of

(1) Law Rep. 4 H. L. 317.

Abraham, whose honesty they seem to have distrusted, the Chartered Mercantile Bank had lodged a stop; and so might Glyn & Co. have done in the present case. They did not do so. And the stop for freight having been removed the dock company, though not till the month of July, delivered the goods to the order of Cottam & Co., not having then either notice or knowledge of the fact that one part of the bill of lading had been indorsed to Glyn & Co., but having from the form of the bill itself notice that there were two other bills of lading either of which Cottam & Co., if dishonest enough, might have indorsed and delivered for value to some other party.

The real question, I think, is, whether the dock company were under such circumstances justified in or rather excused for delivering to Cottam & Co.'s order, though if they had had notice or knowledge of the previous transfer of the bill of lading to Glyn & Co. it would have been a misdelivery, for which they would have been responsible. I do not think the dock company held the goods by virtue of any contract. They held them under the statute subject to a duty imposed by the statute, to deliver them to the person to whom the shipowner was bound to deliver them. And, as I think, they were justified, or rather excused, by anything which would have justified or excused the master in so delivering them. So that, I think, the very point which has to be decided is that raised by Lord Westbury, namely what will excuse or justify the master in delivering.

The case of *Barber* v. *Meyerstein* (1) settles that the mere fact that there were parts of the bills in the hands of the mortgagor or pledgor does not form a justification or excuse for an innocent purchaser from the mortgagor or pledgor, whichever he was, taking the goods. If it could be proved that the other parts of the bills of lading were left in the hands of the mortgagor or pledgor, in order that he might seem to be the owner, though he was not, a purchaser from the person in whose hands they were thus left might either at common law or under the Factors' Acts have a good title; but there is not in this case, any more than there was in *Barber* v. *Meyerstein* (1), any evidence to raise such a question.

(1) Law Rep. 4 H. L. 317.

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But the master is not in the position of a purchaser from the holder, or person supposed to be the holder, of a bill of lading. He is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading—in this case Cottam & Co.—or their assigns, that is, assigns of the bill of lading, not assigns of the goods. And I quite assent to what was said in the argument that this means to Cottam & Co., if they have not assigned the bill of lading, or to the assign if they have. If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear, he would fulfil the contract if he delivered to Cottam & Co. on their producing the bill of lading unindorsed; he would also fulfil his contract if he delivered the goods to anyone producing the bill of lading with a genuine indorsement by Cottam & Co. He would not fulfil his contract if he delivered them to anyone else, though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract. But at the request of the shipper, and in conformity with ancient mercantile usage, the master has affirmed to three bills of lading all of the same tenor and date, the one of which bills being accomplished the others to stand void.

In *Fearon* v. *Bowers* (1), decided in 1753, Lee C.J. is reported to have ruled "that it appeared by the evidence that according to the usage of trade the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury were therefore directed by the Chief Justice to find a verdict for the defendant." Lord Tenterden says (I quote from the 5th edition of Abbott on Shipping, the last published in his lifetime, part 3, chap. ix., sect. 24), "But perhaps this rule might upon further consideration be held to put too much power into the master's hands." It is singular enough that 129 years should have elapsed without its having been necessary for any Court to say whether this rule was good law. It was suggested on the argument with great probability that, especially after the caution given immediately after the passage I have

(1) 1 Sm. L. C. 782, 8th ed. n. to *Lickbarrow* v. *Mason*.

read (part 3, chap. ix., sect. 25), masters have declined to incur the responsibility of deciding between two persons claiming under different parts of the bill of lading, so that the case has not arisen. If this rule were the law, it would follow à fortiori that if the master was entitled to choose between two conflicting claims, of both of which he had notice, and deliver to either holder, he must be justified in delivering to the only one of which he had notice. So that I think it is necessary to consider whether it is law, and I do not think it can be law, for the reason given by Lord Tenterden; it puts too much power in the master's hands. Where he has notice or probably even knowledge of the other indorsement, I think he must deliver, at his peril, to the rightful holder or interplead.

But where the person who produces a bill of lading is one who —either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill—would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to some one else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that therefore it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts.

It is not merely that, as Bramwell L.J. says (1), "it is the undoubted practice to deliver without inquiry to anyone who produces a bill of lading," i.e. when no other is brought forward, and that the evidence given in *Fearon* v. *Bowers* (2) must have proved that much, though it seems also to have proved more; but that, as it seems to me, unless this was the practice, the business of a shipowner could not be carried on, unless bills of lading were made in only one part. I cannot say on this anything in addition to what Baggallay L.J. says (3) and I quite assent to his reasoning there; I think also that the only reasonable construction to be put upon the clause at the end of the bill of lading is that the shipowner stipulates that he shall not be liable on this contract if he bonâ fide, and without notice

(1) 6 Q. B. D. 492. (2) 1 Sm. L. C. 8th ed. 782.
(3) 6 Q. B. D. pp. 502, 503.

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or knowledge of anything to make it wrong, delivers to a person producing one part of the bill of lading, designating him—either as being the person named in the bill if it has not been indorsed, or if there be a genuine indorsement as being assign—as the person to whom the goods are to be delivered. In that case, as against the shipowner, the other bills are to stand void. Even without that clause I should say that the case falls within the principle laid down as long ago as the reign of James I. in *Watts* v. *Ognell* (1). That depends, says Willes J. in *De Nicholls* v. *Saunders* (2), "upon a rule of general jurisprudence, not confined to choses in action, though it seems to have been lost sight of in some recent cases, viz., that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from his obligation." The equity of this is obvious. It was acted upon in *Townsend* v. *Inglis* (3), where goods lodged in the docks by Reed & Co. were by them sold to Townsend and a delivery order was given by Reed & Co. to Townsend. Townsend paid for the goods to Reed & Co.'s brokers, who misappropriated the money. Then Reed & Co. countermanded the order and finally removed the goods from the docks before the dock company had any notice either of the sale to Townsend or of the delivery order given to him. Townsend brought trover against Reed & Co. and the dock company. Gibbs C.J. a very great commercial lawyer, left to the jury the question as to whether Townsend was, on the evidence as to previous dealings, justified in paying the broker, which the jury found he was, and the plaintiff had a verdict against Reed & Co., but he directed a verdict for the dock company, saying, "Though the skins were the property of the plaintiffs from the completion of the bargain, the company had made no transfer, and had *no notice* of their possessory title when they delivered the skins to Reed & Co." And in *Knowles* v. *Horsfall* (4) Abbott C.J. treats this as indisputable. Goods, part of which were in a warehouse, had been sold by Dixon to the plaintiff. Abbott C.J. says, as to the parcel in the warehouse, "If the plaintiff had given notice of the sale to the warehouse keeper,

(1) Cro. Jac. 192.
(2) Law Rep. 5 C. P. 594.
(3) Holt, N. P. 278.
(4) 5 B. & Ald. 139.

the latter would not have been justified in delivering them to any other order than that of the plaintiff, but not having received any such notice, the warehouse keeper would have been justified in delivering them to the order of Dixon, who placed them there." I know of no case in which this principle has been departed from intentionally, and though it is very likely that it may have been sometimes lost sight of, I do not know to what cases Willes J. alludes.

The sum involved in this case is not large, but the amounts advanced by those who lend money on the security of bills of lading, and the value of the goods for which warehouse keepers and wharfingers become responsible, are enormous. Which is the more important trade of the two I do not know, but the decision of this case must have an effect on both, and it is therefore of great importance, and requires careful consideration. And that being so, I have felt some diffidence in differing from the two learned Judges who had below come to a different result. Mr. Justice Field seems (1) to have taken a view of the facts as to the way in which the goods came into the hands of the dock company different from that which I have taken, and consequently to have thought that the very important question suggested by Lord Westbury did not arise. Lord Justice Brett thinks (2) that the master cannot be excused as against the first assignee of one part of the bill, who has the legal right to the property, for delivering under *any* circumstances to one who produces another bill of lading bearing a genuine indorsement, unless he would be excused in *all* circumstances; in other words unless *Fearon* v. *Bowers* (3) is good law to its full extent. In this I cannot agree. I think, as I have already said, that where the master has notice that there has been an assignment of another part of the bill of lading, the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is wrong. And I think it probably would be the same if he had knowledge that there had been such an assignment, though no one had given notice of it or as yet claimed under it. At all events, he would not be safe, in such a case, in delivering without

(1) 5 Q. B. D. 135. (2) 6 Q. B. D. 488.
(3) 1 Sm. L. C. 8th ed. 782.

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further inquiry. But I think that when the master has not notice or knowledge of anything but that there are other parts of the bill of lading, one of which it is possible may have been assigned, he is justified or excused in delivering according to his contract to the person appearing to be the assign of the bill of lading which is produced to him.

And I further think that a warehouseman taking the custody of the goods under the provisions of the Merchant Shipping Act 1862 s. 66 &c., is under an obligation cast upon him by the statute to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, and is justified or excused by the same things as would justify or excuse the master. And I find, as a fact, that this was the position of the respondents here. And, on this ratio decidendi, I think that the appeal should be dismissed, with costs.

LORD WATSON:—

My Lords, I am of the same opinion; and I shall only say a word or two in explanation of my own views, because I have had the opportunity of considering the elaborate judgment of my noble and learned friend (Lord Blackburn) in which I entirely concur.

It appears to me that the goods in question were placed in the custody of the respondents, under the provisions of the Merchant Shipping Act of 1862, and I agree with your Lordships that, in the circumstances of this case, the duty of the dock company, in regard to their delivery, differed in no respect from that of the shipowner.

The nature and extent of the obligation, undertaken by the shipowner, to deliver the goods at the end of the voyage, must depend upon the terms of the bills of lading, which contain his contract with the shipper: and every assignee of a bill of lading has notice of, and must be bound by, those stipulations, which have been introduced into the contract, for his own protection, by the shipowner. In the present case the master, for the convenience of the shipper, subscribed to three bills of lading of the same tenor and date, by which he undertook to deliver the goods, at the port of London, to Cottam & Co. or their assigns; and each bill

of lading bore the usual affirmation by the master that he had signed three in all, "the one of which bills being accomplished, the others to stand void."

That is a stipulation between the shipper and the shipowner, and is plainly intended to give some measure of protection to the latter, after he has delivered the goods upon one of the bills of lading, against subsequent demands for delivery, at the instance of the holders of the other bills of the set. It is, in my opinion, inconsistent with any reasonable construction of the stipulation, that the shipowner should be held liable in all cases to deliver to the true owner of the goods, because, in that case, it would give him no protection. The stipulation can have no intelligible meaning or effect, if it does not, under some circumstances, enable the shipowner to resist a claim for second delivery, preferred by the holder of a bill of lading, who has, by virtue of it, the right of property in the goods. On the other hand it is obvious that the stipulation is meant exclusively for the protection of the shipowner, and is not intended to confer upon him the right to select the person to whom he shall deliver, or to affect the rights inter se of the holders of the bills of lading. That being so, I think that the natural and reasonable construction of the language of the contract is that the shipowner is to be exonerated by delivery upon one of the bills of lading, although it does not represent the property in the goods,—with this qualification that, bona fides being an implied term in every mercantile contract, the delivery must be made in good faith, and without knowledge or notice of any right or claim preferable to that of the person to whom he so delivers.

LORD FITZGERALD :—

My Lords, I also have had the advantage of reading the judgment of the noble and learned Lord (Lord Blackburn). I had previously arrived at the same result, though not entirely on the same grounds, and I concur in the decision which has now been announced.

At the close of the very able arguments at the Bar, your Lordships reserved judgment, and you did so, probably, not from any doubt as to the decision which justice and reason required, but

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rather from the great importance of the case to the mercantile community, and from an anxiety that your Lordships' judgment should be so cautiously and accurately expressed as not to conflict with principles of mercantile law, settled long ago and recently affirmed by your Lordships' House.

We have reason to be grateful to the noble Lord for the care he has taken. He has succeeded in expressing your Lordships' decision in language so clear and so simple as not to leave it open hereafter to contend that your Lordships intended to modify or to depart from the decision of this House in *Barber* v. *Meyerstein* (1).

I entirely concur in the condemnation of the law laid down in *Fearon* v. *Bowers* (2) (if it was so laid down there), that in case of presentation to the captain of two or more parts of the bill of lading, by parties claiming to be holders and adversely to each other, the captain was not bound to look into the merits of the particular claims, but had a right to deliver to which of the claimants he thought proper. Such a rule would go far to enable the captain to violate his contract and his duty, and to "accomplish" his obligation by delivery to one whom he may have had reason to believe was not the real owner of the goods.

Before the close of the argument, the noble and learned Earl (Earl Cairns) suggested, for your Lordships' consideration, that the practice of having so many parts of the bill of lading all in the nature of originals was introduced for some purpose of convenience to the consignor or consignee, and that the concluding passage, "the one of which being accomplished the others to stand void," was probably intended for the protection of the shipowner. He further suggested that, in carrying into effect that object, the true interpretation should be that if the master, acting in entire good faith, delivered the cargo on one part of the bill of lading either to the consignee named in it as such, or to an indorsee of one part, he would have "accomplished" the bill of lading so far as it is a contract for carriage and delivery, and be protected even though another part of the bill of lading should prove to be outstanding in the hands of a prior indorsee for value, but of which the master had no notice.

(1) Law Rep. 4 H. L. 317. (2) 1 Sm. L. C. 8th ed. 782.

It is singular that on this point there seems to have been hitherto no direct decision, though the present form of bills of lading has been in use, and the practice of having several parts of the bill of lading has been followed, for considerably more than a century.

In *Fearon* v. *Bowers* (1) tried in 1753, there were three parts and the same form, and in *Wright* v. *Campbell* (2), in 1767, there were two parts and the form the same. *Fearon* v. *Bowers* (1) may be considered to bear on the question of construction, for Lee C.J. is there represented to have said, "all the captain had to do was to deliver on one of the bills of lading."

In the absence of any authority to the contrary, I have come to the conclusion that, so far as the bill of lading is a contract for carriage and delivery, the noble and learned Earl suggested the true interpretation of "one of which being accomplished the others to stand void."

I should have had some difficulty in assenting to the proposition, either generally or as applicable to this particular case, that a delivery which, if made by the master, would justify or excuse him, would equally justify or excuse the warehouseman. The position of the warehouseman, when the stop order had been removed, seems to me to be different, and possibly his liability more extensive. If we had to determine that question it would be necessary to consider carefully the position of the warehouseman, and to have regard to the Merchant Shipping Amendment Act, 25 & 26 Vict. c. 63, ss. 67, 75, and in this particular case to his obligation under the memorandum at foot of the manifest. I refrain from pursuing this topic further, as I do not consider it to be a necessary part of your Lordships' decision, nor does it, in my opinion, affect the result.

A loss has been sustained by the wrongful act of Cottam & Co., which must be ultimately borne by one of three parties. Williams & Co. are not before us, and I say nothing as to whether or not they may be ultimately subject to any liability; but as between the plaintiffs and the defendants in this suit, it seems to me that the plaintiffs, who, by their omissions and want of proper caution, and by their misplaced confidence in Cottam & Co., have enabled

(1) 1 Sm. L. C. 8th ed. 782. (2) 4 Burr. 2047.

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Cottam & Co. to commit that wrong, ought in reason and justice to bear the loss.

The plaintiffs omitted to get up from Cottam & Co. the second and third parts of the bill of lading, or to make any inquiry about them. They were not bound to do so, nor did that omission affect their legal title, but it left them open to a risk, from which they are now to suffer loss. The insecurity created by that omission might have been rectified by notice of their title to the master, or by notice to the defendants at any time before the actual delivery to Williams & Co. The plaintiffs used no proper caution, and took no action of any kind in relation to the goods until after the misdelivery to Williams & Co., and the discovery of the insolvency of Cottam & Co.; and if we could put the question to them, "Why did you pursue so incautious a course?" their reply probably would be, "We trusted to the integrity of Cottam & Co., and we left the entry and warehousing of the goods, the payment of freight, and all matters of detail to Cottam & Co." It cannot be truly said that, as between the plaintiffs and defendants, the plaintiffs are innocent sufferers by the act of a third party.

The result has been the misdelivery of the goods, which the plaintiffs charge as an act of wrong by the defendants rendering them liable in this suit. Having regard to the plaintiffs' legal title, it was no doubt a misdelivery; but the defendants are excused by law from the consequences of an error into which they have been led by the plaintiffs.

In *Lickbarrow* v. *Mason* (1) Buller J. in delivering his opinion in this House observes, "that in all mercantile transactions one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible;" and I may amplify his language by interpolating after "property" the words "and the advance and security of capital."

It will be observed that, in this present decision of your Lordships, nothing has been expressed adverse to that proposition. We give full effect to the bill of lading as a symbol of title to the property comprised in it, and to its indorsement as a transfer of that title as full and effectual as if accompanied by a delivery of actual possession.

(1) 1 Sm. L. C. 8th ed. 806, 807.

We do no more than lay down a rule of construction, and apply a well-established principle of law to this particular case, and we hope it may serve as a landmark for the future.

Judgment appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 1 August 1882.

Solicitors for appellants: *Murray, Hutchins, & Stirling.*
Solicitors for respondents: *Freshfields & Williams.*

[HOUSE OF LORDS.]

ALFRED KINLOCH . . . . . APPELLANT;

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . } RESPONDENT.

Royal Warrant—Booty of War—Grant—Trust or Agency.

The Queen by Royal Warrant "granted" booty of war to the Secretary of State for India in Council "in trust" for the officers and men of certain forces, to be distributed, by the Secretary of State or by any other person he might appoint, according to certain scales and proportions; any doubts arising to be determined finally by the Secretary of State or by such persons to whom he might refer them unless the Queen should otherwise order.

An action having been brought against the Secretary of State for India in Council by the appellant on behalf of himself and all other persons entitled under the royal grant to share in the booty, alleging a distribution of part and possession by the Secretary of State of the residue, and claiming an account and distribution of the residue:—

Held, affirming the decision of the Court of Appeal, that the warrant did not transfer the property, or create a trust enforceable by the High Court of Justice; and that the Secretary of State being merely the agent of the Crown to distribute the fund the action could not be maintained.

APPEAL from an order of the Court of Appeal.

The appellant having brought an action against the respondent, a demurrer to the statement of claim was overruled by Hall V.C., but on appeal allowed by the Court of Appeal (James, Baggallay, and Bramwell L.JJ.)

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The allegations in the claim appear in the report of the case below (1) and in the judgment of Lord Selborne L.C. here.

Dr Tristram Q.C. and *Willis Bund* for the appellant:—

The Judge of the Admiralty Court to whom it was referred under 3 & 4 Vict. c. 65 s. 22 and the Order in Council of the 10th of June 1864 found that certain persons of whom the appellant is one were entitled to share in this booty.

[LORD SELBORNE L.C.:—There is no allegation in the statement of claim of the plaintiff's right to share. How does he claim?]

As army chaplain, ranking as major. This objection was not raised below. The Court of Equity has jurisdiction to entertain such a claim: *Brown* v. *Harris* (2); *The Tarragona* (3); and *Sir Richard Parker* v. *Barker* (4) in 1769, where prize money for the capture of a Spanish galleon was divided equally between the British army, the British navy, and the forces of the East India Company, and Lord Camden held that the troops of the East India Company were entitled to a decree.

[LORD SELBORNE L.C.:—There does not appear to have been a royal warrant. The parties may have made some agreement inter se which a Court of Equity would enforce. It does not seem to have any bearing on the present case.]

Alexander v. *Duke of Wellington* (5) is not against the appellant, for there the grant was not final as here. The Act which transferred the Government of India to the Crown, 21 & 22 Vict. c. 106, enacted by sects 65–68 that the liability to suits should be transferred from the Company to the Secretary of State for India in Council. If this booty had been in the hands of the Company the Court would have compelled them to account and distribute. Any seaman can sue in the Prize Court for prize. A mandamus lies to order the Lords of the Treasury to pay an officer's pension, the Lords having admitted the money to be in their hands: *Reg.* v. *Lords Commissioners of Treasury* (6). The defendant here by

(1) 15 Ch. D. 1.
(2) 13 Ves. 552.
(3) 2 Dod. 487.
(4) Not reported; but cited from an extract (from the Record Office) of the bill and decree.
(5) 2 Russ. & My. 35.
(6) 4 A. & E. 286, 984.

demurring admits the allegation in the claim that he has the money. There are two classes of royal warrants, one where the person appointed is merely an agent; the other as in the present case where he is a trustee accountable in equity to the cestui que trust.

[They also referred to 2 Will. 4 c. 53 ss. 2, 14, and 1 & 2 Vict. c. 2 ss. 2, 12.]

Graham Hastings Q.C. *Macnaghten* Q.C. and *Alexander Young* for the respondent were not called on.

LORD SELBORNE L.C.:—

My Lords, although this case may be one of public importance as regards the subject of the order appealed from, yet to my apprehension the case is one of too little doubt for any argument to overcome the demurrer to the claim. I say nothing of the somewhat defective manner, to say the least, in which the statement of claim is framed. The claim is made by the appellant "on behalf of himself and all other the persons who under the royal grant of the 10th day of June 1864 are entitled to share in the Banda and Kirwee Booty": not shewing how he is himself entitled. I say nothing upon the point whether there has been such a miscarriage as would be fatal to the case. My reason for not dwelling upon it is that it does not seem to be a point upon which the judgment turned, either in the Court of first instance or in the Court of Appeal; and doubtless if that objection had been seriously urged an opportunity would have been given, and I think ought to have been given, to the present appellant to amend his pleading, so as to shew more distinctly the manner in which he brought himself within the orders in question.

The object of the action was to compel the Secretary of State for India in Council to account, on the footing of a trust, for moneys which were alleged to be in his possession under the grant of the Crown, and to belong to the parties who were entitled to share in the Banda and Kirwee booty. The real questions, and I think the only real questions, for your Lordships to determine are two; first, whether the Secretary of State for India in Council is properly sued; and secondly, whether there is a trust, as alleged,

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which can be enforced on the Equity side of Her Majesty's High Court of Justice.

With respect to the Secretary of State for India in Council, I entirely agree with what seems to have been the opinion of the Court of Appeal. He is here sued as a corporation. It is not the individual who now happens to fill that office who is sued, but it is the officer bearing that description; a remarkable and special description, derived evidently from s. 65 of 21 & 22 Vict. c. 106; which simply enacted that suits to establish rights, which if that Act had not been passed would have belonged to the East India Company and for which they might have sued, and again suits to establish claims, which if that Act had not been passed would have been proper to be made in actions at law or suits in equity against the East India Company, might be brought by or against the Secretary of State for India in Council. The enactment seems to proceed on the same principle on which in Banking Acts public officers are authorized to sue and be sued as representing the persons really entitled or liable. This is no doubt a very high public officer; and the designation "in Council" is added, I suppose, in order that all matters arising out of such suits may be considered not only by himself individually, but by himself in his Council. Whatever the reason for that may have been, the enactment is limited as I have expressed it; and this is clearly not a suit brought against him as representing the late East India Company, or which can by any possibility be described as a suit which, if the Indian Government Act had not been passed, might have been brought against the East India Company. Therefore, so far there seems to be no ground for suing the Secretary of State for India in Council in the manner in which he is here sued.

It is said, and I daresay rightly said, that for some other purposes, under particular Acts of Parliament which define those purposes, he may be in like manner sued. But it has not been alleged that any of those Acts of Parliament extend to the subject matter of this action.

I think that goes a long way to shew that in reality the power given by the Royal Warrant has been misconceived, and that the position of the Secretary of State for India in Council

under the Royal Warrant has also been misconceived. Still it would not be altogether satisfactory to proceed on that ground alone, (although it might be necessary to do so,) if it really appeared that the intention of the Crown, in the Order in Council and the Warrant which passed from the Crown upon this subject, was to constitute the person who for the time being might fill that office of state a trustee in the ordinary sense of the word, liable to account in a Court of Equity to private persons. The very fact of his not being described in the grant by his personal name, and not being described as the Secretary of State, but as "the Secretary of State for India in Council," and "for the time being," the very fact that the grant is made in that form goes, in my mind, not a small way to shew, that it could not have been the intention of the Crown in these documents to constitute a trust in the manner insisted upon. And when I look at the documents themselves, that appears to me to be more and more clear.

The first document, the Order in Council, does not contain any grant at all; but it recites the military operations by means of which the booty was captured, and that the Queen "has signified her gracious pleasure that the property and the proceeds thereof shall be granted to and distributed amongst the forces concerned in the operations above referred to, in such manner as may be hereafter determined." Most assuredly that is not a grant, although it is an announcement, from which the Crown was not likely to depart, of an intention to make a grant. It further recites that a proposal had been made for the consideration of the Queen as to the manner of distribution and the persons to participate, which had been objected to by some of those persons who thought that they had a moral right to participate in the booty —that is to say, such a species of moral claim as could exist without an actual grant by the Crown, having regard to the course usually pursued in similar cases. Then various claims advanced by different officers to participate are also mentioned, claims which of course could only be such as men might make upon the bounty of the Crown in a matter of this kind, and not by any possibility enforceable in any Court of Justice—such, for example, as the claim which is expressed in one passage, where it is said that

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"the prize agents of the force under the command of Sir George Whitlock have preferred a claim that the property should be *granted* exclusively to the force under that officer's command"; shewing clearly that all those claims were preliminary to a grant, and anticipatory of a grant, and not founded upon any legal right.

Now the existence of those claims (that and nothing else) was the cause of the Crown availing itself of the power given by 3 & 4 Vict. c. 65 to refer any questions which the Crown might think fit to refer, "concerning booty of war, or the distribution thereof, to the judgment of the High Court of Admiralty," who should have jurisdiction to decide the matters so referred. Then what did the Queen refer? "All claims to share in the property captured," and nothing else—and it appears to me that they were claims such as I have stated—claims not founded upon a grant actually made, but claims anticipatory of a grant; and the reference was to be in aid of the judgment of Her Majesty as to the persons to whom she should, in the exercise of her royal bounty, make the contemplated grant. Accordingly those claims, and nothing else, being referred, on those claims and on nothing else the judgment of the Court of Admiralty proceeded, which as between the parties to those claims was no doubt a judgment within the jurisdiction of that Court by virtue of the reference. It may be that, if the grant had been made, and the money paid over and put out of the power of the Crown to deal with in any way, and if something had been done inconsistent with the grant, any Court having authority to deal with the matter might be bound to rectify any wrong done. But that judgment decided nothing about what funds were to be distributed, or anything of that kind, but simply who were the persons entitled to share, and in what proportions they were to share, in whatever might be the subject of grant.

Then Her Majesty at the end of this Order in Council reserves expressly to herself "the right to direct the rates or scale of distribution according to which the property or the proceeds thereof shall be paid to the several ranks of the force or forces to which such property shall be adjudged." Therefore, the only thing which the Court of Admiralty determines, or is asked to

determine, is this, what classes of forces should share, and in what proportions inter se. The grant is to be made by the Crown—it is not made, and cannot be made, either by the Order in Council or by the judgment of the Court of Admiralty; and the scale in which the distribution is to be made amongst the several ranks of the forces to which the property is adjudged is reserved to be settled by the Crown.

Then we come to the warrant; and the warrant recites what property is intended to be granted, by the description of certain property captured at and in the occupation of the towns of Banda and Kirwee on certain dates, and it recites that the property "has since been duly sold." That is described as the subject of the grant; and it recites that this property is estimated to be of the value of 55 lacs, odd, of rupees. Then it goes on to recite the proceedings prior to, and the determination of, the Court of Admiralty; and it then recites the recommendation of the Commissioners of the Treasury that some further bounty might be given to certain officers (which is not material), though the amount of the bounty to be so given is not fixed. And then come the words which are relied upon as constituting a trust:—"Now We do hereby give and grant to Our Secretary of State for India in Council for the time being" (upon which I have already made the observations which seem to me pertinent, as shewing what must have been in the mind of the Crown, namely, the intention to employ the agency of a high officer of state rather than to appoint a particular person as trustee) "all the aforesaid booty mentioned to have been captured at or in the said towns of Banda and Kirwee, and the proceeds thereof as aforesaid" (that is the subject, and the only subject granted,) "in trust for the use of" the persons intended, to whom Dr. Lushington had adjudged it, "such booty and proceeds to be distributed by Our Secretary of State for India in Council for the time being, or by any other person or persons he may appoint, as follows."

Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust—a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but

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as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect. Of its nature, so far as relates to the person of the agent or trustee, I have already spoken. As to the manner in which it is done, we have, no doubt, the persons interested in connection with that word "trust." The proportions to be given to Lord Clyde and to others, and the scale according to which the different ranks of officers and privates and other persons who are to participate are to receive the booty, are laid down, including the proportions to the native troops and to non-combatants, such as water carriers and so on; and the warrant ends thus: "And We are graciously pleased to order and direct that in case any doubt shall arise in respect of the distribution of the booty or proceeds hereby granted as aforesaid, or respecting any claim or demand on the said booty or proceeds," (not merely doubts but claims, in the largest and most general words), "the same shall be determined by Our Secretary of State for India in Council for the time being, or by such person or persons to whom he shall refer the same, which determination thereupon made shall with all convenient speed be notified in writing to the Commissioners of Our Treasury; and the same shall be final and conclusive to all intents and purposes, unless within three months after the receipt thereof at the office of the Commissioners of Our Treasury We shall be pleased otherwise to order; hereby reserving to ourselves to make such other order therein as to Us shall seem fit."

To hold that to be a trust which could be taken into the Chancery Division of the High Court of Justice would be completely to overturn the whole of that portion of the direction of the Crown, which in the plainest and most distinct words refers all possible disputes to the Secretary of State or some delegate to be appointed by him, and says that his decision shall be final and conclusive to all intents and purposes, unless within a limited

time Her Majesty herself shall otherwise order, which power she reserves to Herself.

I do not at all follow what was said by that very learned and able judge, Hall V.C., in which he seems to have stated that if the Court of Chancery, that is to say the Chancery Division, assumed the jurisdiction which it was asked to exercise, it might, in the course of taking the accounts and administering the fund (so I understand his Lordship to have meant) refer all questions as to the distribution, or as to claims and demands on the property, to the Secretary of State, holding itself bound by his decisions unless they should be afterwards reversed by the Queen; a sort of mixed jurisdiction which would comprise at once that of the Equity side of the High Court of Justice, and that of the Secretary of State for India in Council, as an arbiter without appeal except to the Queen. All I can say is, that such a thing has never yet been heard of, and I apprehend that on no possible principle can it be established. The intention of the Crown, if the Crown had this power (and by the Act of Parliament the Crown had the power to direct as it should think fit, how this distribution should be made), is plain: the intention was to exclude any such extraneous interference; and in my humble judgment the Crown has effectually done so.

Then what are the authorities? I feel it almost unnecessary to make any remarks upon them. All that I will say is this. In *Alexander* v. *Duke of Wellington* (1) there was a claim between Messrs. Alexander and Lord Hastings. The trustees, if I am so to call them, had actually paid the money to Lord Hastings, or had done what was the same thing, had paid it into Court in a suit between himself and one of his creditors to be distributed simply according to the private rights of the parties, between Lord Hastings and his creditors. With that we have nothing to do; but the question whether the fund could be put into trust in this way and administered by the Court of Chancery was determined upon appeal by Lord Brougham as Lord Chancellor, and was distinctly determined by him upon the following footing. Though the trustees had been directed to collect and get in certain funds, and to prepare a scheme of distribution, which they

(1) 2 Russ. & My. 35.

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had done, and though two subsequent warrants of the Crown had confirmed the distribution made by them, Lord Brougham distinctly held, that, in order to determine whether they were trustees or not in such a sense as to introduce the jurisdiction of the Court of Chancery, the instrument making the grant, and nothing else, was to be looked to, and that the subsequent acts could not make it a trust to be administered in the Court of Chancery, if it was not so by virtue of the instrument itself; and, upon the instrument itself, he said he had no doubt whatever that the question on the merits was beyond the jurisdiction of the Court.

A previous decision by Lord Eldon in *Brown* v. *Harris* (1) was referred to in the course of the argument. There no doubt the Crown did grant a fund to trustees in every sense of that word, the fund being distinctly vested in them, and vested for the purposes for which they were made trustees; and the power of the Crown which had made the grant being entirely at an end, the Court of Chancery might exercise its ordinary jurisdiction; that cannot be doubted. But the question is, whether this instrument is of that kind.

Another case which was mentioned has really no bearing at all upon the matter (2). It was a case in the Prize Court under an Act of George III., which distinctly provided how prizes should be dealt with by the Court. No instance has been produced of any trust of this sort ever being administered by a Court of justice; and I do not think that your Lordships will consider it your duty to make this case the first precedent.

I therefore move your Lordships that the appeal be dismissed with costs.

LORD O'HAGAN:—

My Lords, I am of the same opinion; and I should add nothing to the observations of my noble and learned friend, but that the case is, in certain aspects, of some public importance.

As to the general jurisdiction, which the appellant asks your Lordships to exercise, I concur with the Lord Chancellor. A fund has got into the possession of the Crown, where it remains, without transfer or creation of trust, or derogation from the royal

(1) 13 Ves. 552. (2) *The Tarragona*, 2 Dod. 487.

control over it; and a Court of Equity would assume a jurisdiction which was never before assumed by such a Court, if it should interfere with that fund, under the circumstances and for the reasons which have been pressed on the attention of the House. The complications and difficulties of administration which would attach to any interference of the kind are manifest, and would make it very inconvenient from considerations of public policy. Mere inconvenience would not justify the refusal of relief, if the appellant's claim were sustained by principle or authority; but in my view, the argument has failed to establish, for it, the support of either.

In strictness, the appellant has made no case. His own statement merely represents him as a clergyman attached, in some way, to the army, at a particular time. But, of the nature of his claim to participate in the booty we are not, at all, properly informed. It may be, that, under some army regulation or some statutable provision, he may have been constituted an officer, with a certain rank, bringing him within the purview of the royal bounty; but we have no allegation of any such thing, and the want of it could only be supplied by an amendment of the pleadings. Possibly, if the claim seemed substantial and entertainable, that amendment might be allowed, as he has acted for himself in the conduct of his case, and the objection does not appear to have been taken in the Court below. But it seems to me, that his contention fails, as well with reference to the defendant whom he sues, as to the right of a Court of Equity to meddle with his case.

As to the defendant, his official position does not constitute him a trustee answerable for a breach of duty, or the fulfilment of a legal obligation, in an ordinary Court of justice. The Secretary of State for India is a great officer, who has, from time to time, represented public bodies and been made amenable, in his representative capacity, to such a Court. And possibly a warrant might be so shaped—investing him, personally, with property for the benefit of named individuals, on a specific trust,—as to give it jurisdiction over him. But he is not brought here because he is statutably responsible, or because the warrant imports a personal charge or a personal liability. It is the "Secretary of State for

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the time being" to whom the Sovereign delegates the exercise of a certain discretion, with careful reservation to herself of power to regulate or overrule it, at her pleasure.

There is no magic in the word "trust." In various circumstances, it may represent many things, and the Secretary of State to whom a delegation was made for special and specified purposes, might well be described as a "trustee" for the Crown, as, for the Crown, he was required to take on himself the distribution of the property in question. But he was not constituted a "trustee" for a cestui que trust entitled, according to the rules of Equity, to ask for the administration of a fund.

As to the cases of *Alexander* v. *The Duke of Wellington* (1) and *Brown* v. *Harris* (2), I shall only say that they seem to me to give no sufficient support to the contention of the appellant.

Her Majesty has vested in her a certain fund, and it must get out of her possession before a Court of Equity can deal with it. She might, of her own motion and at her own discretion, have disposed of it to trustees for the expressed purpose of division amongst specified individuals; and in that case they might have successfully sued for the enforcement of their rights. But the Queen does no such thing. There is, as I have said, no evidence of any transfer from her. She does no act to create rights so enforceable. She employs the Court of Admiralty, under statutable authority, to ascertain the classes of persons properly entitled to the benefit of the fund, and the Judge of that Court, after due inquiry, designates those classes. This being ascertained, it is further necessary that amongst those classes there shall be a fair distribution of their respective shares. Her Majesty cannot make such a distribution, personally; and she appoints her Secretary of State for India that he may execute a duty which she cannot perform. What power was given to him, and under what limitations, the warrant clearly shews. It directs that "in case any doubt shall arise in respect of the distribution of the booty or proceeds hereby granted as aforesaid, or respecting any claim or demand on the said booty or proceeds," the Secretary of State shall determine it; and his judgment "shall be final and conclusive to all intents and purposes, unless within three months after the receipt thereof

(1) 2 Russ. & My. 35. (2) 13 Ves. 552.

at the office of the Commissioners of our Treasury, we shall be pleased otherwise to order, hereby reserving to ourselves to make such other order therein as to us shall seem fit." The appellant founds his case on a "claim or demand" for an undistributed portion of the booty; and the decision as to that demand is relegated to the Secretary for India with a reservation of the sovereign's authority to reverse or modify his decision. His position and responsibility do not appear to me to warrant interference with him by the Court whose authority has been invoked by the appellant: and I think that the appeal must be dismissed with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion; and I intend to rest my judgment on a very short point. I assume that Her Majesty had a fund here which she might, if she had been so advised, have handed over to a trustee, to hold in trust for those persons to whom she had given a special interest in it, leaving him, the trustee, to determine who they were and to hold it for them. The effect of such a course would have been that any one of those persons whom she had made cestuis que trust could have brought the whole fund into Chancery, and have had the whole matter there investigated. I think that it would have been very injudicious to advise Her Majesty to do so, but I think that she might have done so. I will not express an opinion upon the point, which has arisen, whether the Secretary of State for India in Council was such a person as could have been made a trustee in this way. I will suppose for a moment that he was.

But then it is equally plain that Her Majesty, instead of handing over the fund to a trustee so as to carry the whole thing into the Court of Chancery, might have said this, "I will appoint an agent to examine into the claims of the parties and to distribute the fund amongst them;" and, if there was anything on which there was so much doubt that it should not be given to that person to determine, leaving an opportunity to appeal to Her Majesty, who would reserve to herself full power to make a grant; and Her Majesty would, I presume, exercise that power, if it was a question of law, by referring it to the Judicial Committee of the Privy

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Council to give their advice, as she has, I think, full power to do. Now if this were a trust of that kind the Court of Chancery would have no power over it; the individuals who were to receive Her Majesty's bounty would not have the relation of cestui que trust and trustee as between them and Her Majesty's agent; they could not bring the matter into the Court of Chancery; they could bring it before the Secretary of State for India in Council, subject to Her Majesty taking the opinion of the Judicial Committee of the Privy Council upon any question of law, and subject of course to such further inquiries as Her Majesty might think fit to order. And that, I think, is a reasonable construction of this grant, and is in fact what Her Majesty did.

I said that I was going to rest my judgment on a short point; it is simply this: On the construction of this warrant, as I read it, the Secretary of State for India in Council was made an agent of the Queen, subject to Her Majesty's control and power, to pay away the moneys when quite satisfied that the claims were right, but he was by no means made a trustee subject to the power and control of the Court of Chancery.

LORD WATSON:—

My Lords, this case, in my opinion, is a very plain one, and as I entirely concur not only in the result at which your Lordships have arrived, but also in the reasons which have been given by your Lordships, I have nothing to add.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 19th May 1882.

The appellant in person.
Solicitor for respondent: *H. Treasure.*

[HOUSE OF LORDS.]

HENRY GOODMAN AND JOHN BLAKE, THE YOUNGER . . . . . } APPELLANTS;

AND

THE MAYOR AND FREE BURGESSES OF THE BOROUGH OF SALTASH IN THE COUNTY OF CORNWALL . . . . . } RESPONDENTS.

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1882
Aug. 1.

Prescription—Profit à prendre in alieno solo—Presumption of lawful Origin—User—Fishery—Charitable Trust—Perpetuity.

A prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a borough corporation and its lessees; without any qualification except that the free inhabitants of ancient tenements in the borough had from time immemorial without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the locus in quo from the 2nd of February to Easter Eve in each year, and of catching and carrying away the same without stint for sale and otherwise. This usage of the inhabitants tended to the destruction of the fishery, and if continued would destroy it:—

Held (LORD BLACKBURN dissenting), that the claim of the inhabitants was not to a profit à prendre in alieno solo: that a lawful origin for the usage ought to be presumed if reasonably possible: and that the presumption which ought to be drawn, as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage.

APPEAL from an order of the Court of Appeal (Brett and Cotton L.JJ. Baggallay L.J. dissenting) (1) affirming a judgment of the Common Pleas Division (2) (Grove and Denman JJ.) in favour of the respondents.

The facts were stated in a special case (set out in the report of the case below (2)) the material parts of which are as follows:—

1–3. Action of trespass by the respondents against the appellants (two free inhabitants of ancient tenements in the borough of Saltash, Cornwall) for a trespass committed in a certain part of the river Tamar and on the soil thereof and for disturbing, catching, carrying away and converting to their own use divers

(1) 7 Q. B. D. 106. (2) 5 C. P. D. 431.

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quantities of the oysters therein for the purposes of sale and otherwise.

4. The respondents are a corporation incorporated by divers royal charters granted respectively in the reigns of Elizabeth, Charles II., and George III. By virtue of such charters and by prescription the respondents claim to be possessed of the soil and of a certain several oyster fishery in those parts in the river Tamar and its tributaries.

5–8. The charters, corporation minutes and other documents formed part of the case.

9. The free inhabitants of ancient tenements in the borough of Saltash have from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters in the locus in quo mentioned in the statement of claim from the 2nd day of February in each year to Easter eve in each year both inclusive, and of catching and carrying away the same without stint for sale and otherwise. The acts complained of were done in exercise of the privilege.

10. The Tamar was at the time and locus in quo mentioned a navigable river or arm or creek of the sea where the tide flows and reflows.

11. The appellants contend that the soil of the Tamar at the locus in quo, and the several oyster fishery (if any) are vested in the Crown or Duchy of Cornwall. The respondents contend that the soil and several fishery are vested in them.

12–15. The appellants claim to have exercised the privileges described in paragraph 9 first as free inhabitants of the borough of Saltash; and secondly as subjects of the realm.

16. The respondents contend that an usage to dredge oysters without stint for the purposes of sale or otherwise in a several fishery is unreasonable and destructive of the fishery, and does not raise any presumption of any royal grant or charter, and cannot be the subject of any prescription or right under 2 & 3 Wm. 4 c. 71. The said usage does in fact tend to the destruction of the said oyster fishery and if continued will destroy the same.

17. The questions for the opinion of the Court (who are to be at liberty to draw inferences of fact and to make all such amendments in the pleadings as may be necessary to decide the real

questions between the parties) are—(1.) Whether the appellants as subjects of the realm are entitled to dredge for oysters and to carry away the same without stint for sale or otherwise between the 2nd of February and Easter eve in each year both inclusive? or (2.), as free inhabitants of ancient tenements in the borough? or (3.), as free inhabitants of the borough?

If the appellants are not so entitled, judgment to be entered for the respondents for 40*s.* and for an injunction with costs.

If the Court should be of the contrary opinion, judgment to be entered for the appellants with costs.

The appeal was twice argued, first before Lord Selborne L.C. and Lords Blackburn and Watson on the 15th and 16th of May by *M. Muir Mackenzie* for the appellants, and *Arthur Charles* Q.C. (*C. Hall* Q.C. and *J. V. Austin* with him) for the respondents; and secondly before Lord Selborne L.C. Earl Cairns and Lords Blackburn, Watson, Bramwell, and Fitzgerald on the 6th and 7th of July by the same counsel.

M. Muir Mackenzie for the appellants:—

The corporation cannot shew a grant of a fishery, as they must if they relied on an express grant. A grant of "water" (such as is contained in their charters) by the Crown in a navigable tidal river would not pass the fishery, though it would if granted by a private person in private water. The onus of proving an exclusive fishery lies on the corporation: *Mayor of Orford* v. *Richardson* (1); *Rogers* v. *Allen* (2); *Seymour* v. *Lord Courtenay* (3). The corporation are driven to rely on length of user, and the user of the appellants is equally long and well established. A lawful origin for the right claimed by the appellants ought to be presumed if it reasonably can; per Willes J. in *Johnson* v. *Barnes* (4). A lawful origin may be presumed by supposing a grant before Magna Charta to the corporation subject to a trust or condition in favour of the right claimed by the appellants. The difficulty in *Lord Rivers* v. *Adams* (5) (the absence of a corporation) does not exist here. A corporation can prescribe for common for themselves

(1) 4 T. R. 437; 2 H. Bl. 182.
(2) 1 Camp. 311.
(3) 5 Burr. 2814.
(4) Law Rep. 7 C. P. 592, 604; and 8 C. P. 527.
(5) 3 Ex. D. 361.

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and all the inhabitants: *White* v. *Coleman* (1); the case of the city of Coventry *Boteler* v. *Bristow* (2); and see *Wright* v. *Hobert* (3), citing Duke on Charitable Uses, p. 164; *Beadsworth* v. *Torkington* (4); *Earl De la Warr* v. *Miles* (5).

Arthur Charles Q.C. (*J. V. Austin* with him) for the respondents:—

The finding that the usage is destructive of the fishery is fatal to the claim. Such a right cannot be acquired by any length of time: *Lord Rivers* v. *Adams* (6); nor prescribed for through a corporation upon another's land: *Clayton* v. *Corby* (7); *Attorney-General* v. *Mathias* (8); *Bland* v. *Lipscombe* (9). There is no authority for such a claim by an inhabitant of a borough adversely to the corporation. In *White* v. *Coleman* (1) the claim was against the land of another and not of the corporation, and was defined and limited. If confined to the use of their own houses it might be good, but such a claim without stint and for sale has always been held bad: notes to *Mellor* v. *Spateman* (10); *Hinks* v. *Clerk* (11); *Mannall* v. *Fisher* (12); *Hilton* v. *Earl Granville* (13).

[LORD BLACKBURN referred to *Marquis of Salisbury* v. *Gladstone* (14).]

The user by the corporation being exclusive and all the year round, and the user by the appellants being for part of the year, the whole usage is inconsistent and repugnant and cannot be referred to one title: and see *Mayor of London* v. *Low* (15). Either the grant to the corporation with a clause giving the right to an indefinite number of persons, a fluctuating body, to fish without stint is a good grant with a bad proviso; or it is a bad grant. If the latter it will not help the appellants, for it is a fact that the public have no right to fish. The interpretation of the 9th paragraph by Brett L.J. is the correct one; that it was not worth while for the corporation to interrupt the usage. Their leases

(1) Freem. 135.
(2) Year Book, 15 Ed. IV. 29.
(3) 9 Mod. 65.
(4) 1 Q. B. 782.
(5) 17 Ch. D. 535.
(6) 3 Ex. D. 361.
(7) 5 Q. B. 415.
(8) 4 K. & J. 579; 27 L. J. (Ch.) 761.
(9) 4 E. & B. 713, n.
(10) 1 Wms. Saund. (6th ed.) 339, 346 c, 346 f.
(11) 2 Lev. 252.
(12) 5 C. B. (N.S.) 856.
(13) 5 Q. B. 701.
(14) 9 H. L. C. 692.
(15) 49 L. J. (Q.B.) 144.

and acts of ownership are inconsistent with the right claimed by the appellants.

M. Muir Mackenzie replied.

THE HOUSE took time for consideration.

Aug. 1. LORD SELBORNE L.C. :—

My Lords, this appeal, which has been twice argued before your Lordships, is from an order of the Court of Appeal affirming a judgment of the Common Pleas Division upon a special case in an action of trespass brought by the corporation of Saltash against the appellants. The alleged trespass consisted in taking oysters from a part of the river Tamar (being a navigable tidal river or arm of the sea), in which the corporation claims a several oyster fishery; and the questions to be determined are, (1.) whether, upon the facts appearing by the special case, the right of the corporation to a several fishery is established; and (2.), if this be so, whether the free inhabitants of ancient tenements in the borough of Saltash, (to which class the appellants belong,) are entitled to participate in the benefit of such several fishery, by dredging for oysters in the locus in quo during the period from Candlemas to Easter in every year.

The respondents have been successful in both the Courts below. But in the Common Pleas Division the case was treated as depending upon the question whether the free inhabitants of ancient messuages in Saltash could be presumed to be separately incorporated, so as to be capable of prescribing for a profit à prendre in alieno solo; and it was held (I think rightly, on the same grounds as in *Lord Rivers* v. *Adams* (1) and *Chilton* v. *Corporation of London* (2)) that such an incorporation ought not, under the circumstances, to be presumed. In the Court of Appeal the opinions of the learned Judges were divided; Baggallay L.J. thinking that the respondents had failed to establish such a right, exclusive of the appellants, as was necessary to maintain the action; while Brett and Cotton L.JJ. thought that the title of the respondents was sufficiently proved, and that the right of fishing claimed by the free inhabitants of ancient messuages

(1) 3 Ex. D. 361. (2) 7 Ch. D. 740.

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within the borough could not have any lawful foundation, unless at the mere will and pleasure of the respondents.

The "burgesses of Essa" (now called Saltash) were a corporation from time immemorial, and, as such, enjoyed various customs, liberties, and rights. Some of these were confirmed by an ancient charter of Reginald de Vantort, in whose lordship (held under the duchy of Cornwall) Essa was included, and by subsequent inspeximus charters of Richard II., Edward IV., Henry VIII., Queen Elizabeth, Charles II., and George III. Queen Elizabeth's charter, after reciting that the burgesses of Essa, from time whereof the memory of man was not to the contrary, had peaceably held and enjoyed the rights specified, "and divers other customs, liberties, immunities, exemptions, and jurisdictions, as well by prescription as by reason and pretext of the aforesaid charter, grants, and confirmations of old time made," reconstituted the corporation under its present name, and granted to it anew its former rights and liberties. The charter of Charles II. altered the constitution of the municipal body, and the manner of electing burgesses; and those alterations were confirmed by George III. No mention is made in any of these charters of any several fishery; and I think they do not advance the case of the corporation, except so far as they recognise its title to other prescriptive rights besides those which they specify, and which must (of course) be otherwise ascertained. The proper mode of ascertaining what these are is by evidence of user; and it does appear, by a lease executed by the corporation in 1680 on certain trusts for the payment of its debts, and by a series of later leases, under which rents have been paid to and received by the corporation, commencing in 1774 and continued till a quite recent date, that the right to fish for oysters in the locus in quo was exercised by the corporation and its lessees for nearly 200 years before the commencement of this action, without any other qualification than that usage in favour of the free inhabitants of ancient tenements within the borough, on which the appellants rely. If that usage can be reconciled with the existence and the enjoyment by the corporation of a several oyster fishery, the right of the corporation to such several fishery is established.

The 9th paragraph of the special case is in these words:—[His

Lordship read them.] The 16th paragraph, which is addressed to the question of the reasonableness or unreasonableness of this usage, will hereafter be considered. For the present I think it convenient to deal with the facts and with the inferences to be drawn from them (liberty to draw such inferences being reserved by the special case) as if the usage (supposing it to be otherwise good in law) were not open to objection on the score of unreasonableness.

According, therefore, to this statement in paragraph 9, that class of inhabitants to which the appellants belong has fished, in the manner of which the lawfulness is now for the first time called in question, openly and as of right, in every year from the time of King Henry II. (or earlier) down to the date of the alleged trespass for which this action was brought ; including all those years during which the fishery was under lease from the corporation. Those leases were in every instance (as far as appears) made to inhabitants of Saltash to whom the usage in question could not have been unknown, and although no express exception was made in any of them in favour of the right of the free inhabitants of ancient tenements to fish from Candlemas to Easter, they did always so fish without interruption either from the corporation or from its lessees. Such a usage, so definite and so limited in its character both as to persons and as to time, cannot (in my opinion) be regarded as a series of trespasses acquiesced in through mere neglect or indifference by the corporation and the lessees. The terms of the special case, the total absence of any ground for inferring that it was under any bye-law, or otherwise by leave or licence of the corporation, and the leases, with which any such leave or licence would have been inconsistent, satisfy me that it was not "precario" any more than it was "clam" or "vi." The special case, no doubt, does not find that such fishery was "of right," (which would have been to prejudge the question of law left for the opinion of the Court) but only that it was under a claim of right. But an open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, if a lawful origin was reasonably possible in law.

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That in such a case a lawful origin ought to be presumed, if it is reasonably possible, is established by many authorities, among which I think it sufficient to mention *Cocksedge* v. *Fanshawe* (1), both because the judgment of the Court of Queen's Bench in that case was affirmed by this House, and because it is an instance of a right being established (on this principle) under and by virtue of a prescriptive title in a corporation, in favour of a particular class of members of that corporation, and against the corporation itself.

The corporation of London had an immemorial right to one farthing duty on every quarter of corn imported into the City coastwise east of London Bridge (except from the Cinque Ports and Kent) by all persons not free of the City; and a claim of freemen carrying on the business of cornfactors within the City to receive from the corporation and retain for their own benefit the duties collected by the officers of the corporation upon corn so imported by their correspondents, was held to be established by proof of long usage. It was contended for the plaintiff, who was a freeman cornfactor (2), "that in the original grant to the corporation there might have been a proviso that whenever corn subject to the duty should be consigned to free factors they should be entitled to receive the farthings to their own use," and on the other hand (3) "that the claim, whether as founded on an exception or proviso in the original grant, or as a trust or otherwise, could not have had a legal origin." Lord Mansfield (4) said, "The only question is, whether such usage could by any possibility have a legal commencement. The plaintiff was not bound to find out what the actual commencement was, because it has existed from time immemorial. The City itself has no writing or grant to shew. . . . The rule of law is that wherever there is an immemorial usage the Court must presume everything possible which could give it a legal origin. . . . Now, why is it not possible that in the original grant, the Crown may have said, for the purpose of encouraging persons to take up their freedom, that no freeman should pay the duty to the City, either for his own corn, or for

(1) 1 Dougl. 118; 3 Brown's Par. Cas. 703, 707, 708, 709.
(2) 1 Dougl. 125.
(3) 1 Dougl. 129.
(4) 1 Dougl. 132.

corn consigned to him as a factor? Would such a grant be void? Certainly, there may have been such a grant."

It is clear, both from what Lord Mansfield said when a new trial was granted (1) and from the reasons given on both sides in the House of Lords, that the claim, established by the plaintiff Cocksedge, was not to an exemption of the corn consigned to him from duty, but to have the duty actually received from the owners upon the importation of that corn paid over to him by the corporation for his own use and benefit (2). Among the reasons signed by the Attorney-General (Wallace) and Mr. Chambre (3), in support of the judgment which the House of Lords affirmed, was this:—"In the original grant from the Crown to the corporation, the duty on corn consigned might be appropriated to the use of the freemen to whom it was so consigned. A corporation may take such a grant, or they may prescribe for the benefit of individual members belonging to such corporation; and the individuals may enjoy and assert the rights so granted or prescribed for in the name and through the medium of the corporation to which they belong."

Is it, then, or is it not, reasonably possible, that the right claimed by the present appellants may have had a lawful origin, assuming as true all that is stated in the special case, and also assuming that the mayor and free burgesses of Saltash have a prescriptive title to a several fishery in the locus in quo? An affirmative answer to that question would solve every difficulty in the case, and would reconcile all the evidence as to user on which both parties rely.

If it were necessary that the class to which the appellants belong should make out a right to a profit à prendre in alieno solo, I should be of opinion that they could not do so. *Gateward's Case* (4) is a conclusive authority against such a claim by such a class, unless made through a corporation under its corporate title, as it was in the Coventry Case (*Boteler* v. *Bristow* (5)), and in *White* v. *Coleman* (6). Here there is no corporation through which the claim could be made, except the mayor and free burgesses of

(1) 1 Dougl. 123.
(2) 3 Bro. P. C. 703, 706, 707.
(3) 3 Bro. P. C. 708, 709.
(4) 6 Co. Rep. 59 b.
(5) Year Book, 15 Ed. IV. 29 b, 32 b.
(6) Freem. 135; 3 Keb. 247.

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Saltash themselves; and the right could not possibly be prescribed for through them, or under their title, as a profit à prendre in alieno solo, because, if a several fishery exists, they are the owners in fee simple of that fishery. But it appears to me to be consistent with all the facts and documents stated or referred to in the special case, that the fishery may have been originally granted to the free burgesses of Essa, subject to a condition or proviso that the free inhabitants of ancient messuages within the borough should be entitled to fish, as they have been accustomed to do, in every year from Candlemas to Easter.

I am unable to discover any reason why this should not be a good foundation in law for the right which the appellants claim. If an actual grant, so qualified, were produced, it would be immaterial, whether the word used in it were "trust," "intent," "purpose," "proviso" or "condition," or whether the trust or duty, imposed on the mayor and free burgesses, were cognizable in equity only, or also at law. In such a grant there would be all the elements necessary to constitute what, in modern jurisprudence, is called a charitable trust. "If I give" (said Lord Cairns in the *Wax Chandlers' Case* (1)), "an estate to A. upon condition that he shall apply the rents for the benefit of B., that is a gift in trust to all intents and purposes." A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust: and no charitable trust can be void on the ground of perpetuity. (*Jones* v. *Williams* (2); *Attorney-General* v. *Mayor of Carlisle* (3); *Howse* v. *Chapman* (4); and see *Attorney-General* v. *Heelis* (5); and *Attorney-General* v. *Mayor, &c., of Dublin* (6).) In a case cited during the argument of this appeal (*Wright* v *Hobert* (7)), Lord Macclesfield established, as a charitable trust, an ancient grant of land for the pasture, during three months of the year, of the cows of "as many of the inhabitants" of a certain village "as were able to buy three cows," and during seven months of the rest of the year, "to be in

(1) Law Rep. 6 H. L. 21.
(2) Amb. 651.
(3) 2 Sim. 437.
(4) 4 Ves. 542.
(5) 2 Sm. & St. 76, 77.
(6) 1 Bli. (N.S.) 347.
(7) 9 Mod. 64.

common for all the inhabitants;" saying, "that if this manner of grazing had been by prescription or usage, no person but the inhabitants of ancient messuages could be entitled to it, but it is otherwise appointed by the grant of the donors."

The law of Scotland, on this class of subjects, may not be (and probably is not) in all respects the same as that of England. But when I find judicial opinions, delivered in some Scotch cases (more or less in pari materiâ), which express with accuracy the point of view from which I regard the case now before your Lordships, I may without impropriety borrow the language of those opinions to illustrate my own. Those Scottish authorities were distinguished from cases of servitude, by Lord St. Leonards, in *Dyce* v. *Hay* (1): "Some of the most important of them" (he said) "are corporation cases, where the inhabitants claimed rights as against their corporation, that corporation being in fact trustees for the inhabitants; and the claim was one, not between the corporation and the public, but between the governing body of a corporate place and the bulk of its own population." In the Musselburgh Case (*Sanderson* v. *Lees* (2)), where the inhabitants claimed rights of recreation, &c., over land vested in the corporation, Lord President MacNeill said (3): "The right of the complainer and the other inhabitants is not to be regarded as a servitude right at all. The magistrates held the property all along for the community; but the purposes for which it has admittedly been possessed by the inhabitants are not inconsistent with the right of property in the magistrates. These uses have been co-existent with the property from the first; and the property as I look upon the case, was in the magistrates for the community for the purposes in question, as much as for other purposes; and I think that the possession contended for and established by the verdict was all along a quality of the right which the magistrates had to this property, and that the inhabitants are entitled to protect it from encroachment." Lord Curriehill (4) said: "On principle as well as on authority I hold that the title of the burgesses and inhabitants consists in the conditions of the grants to the corporation; and that the legitimate effect of the inveterate

(1) 1 Macq. 311.
(2) 22 Sc. Sess. Cas. 2nd Ser. 27, 30, 31.
(3) Page 27.
(4) Pages 30, 31.

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usage following thereon is to explain their true import, and the nature and extent of the grants thereby made in favour of the burgesses and inhabitants." Lord Deas (1) agreed, and added: "I presume there is no doubt at all that if there had been produced original charters dedicating this ground to these particular purposes, the ground could not have been applied to any other purposes; and the question therefore is whether we have not got what is equivalent."

The question being (as I have said), what is *reasonably* possible, it appears to me to be reasonable to presume, in favour of such user as is proved in the present case, that the grant to the free burgesses of Essa of this several fishery, proved only by prescription, and also proved to have been immemorially enjoyed (at certain times and in a uniform manner) by the free inhabitants of ancient messuages within the borough, was originally made to the corporation upon condition, and for the purpose, that it should be so enjoyed. I think that such a presumption is not only reasonable in law, but probable in fact.

The special case, upon the statements in and inferences from which your Lordships have to decide, is silent as to the original relation of "the free inhabitants of ancient messuages" in the borough of Saltash to the body corporate. Under the modern constitution of the borough they are not burgesses or freemen. But the constitution of the municipality was altered by King Charles II., and it is, at least, not improbable, that these "free inhabitants" may have had, before that time, some greater share in the corporate privileges than afterwards. We have to deal with rights acquired, not under the modern, but under the ancient constitution, whatever it was: *Beadsworth* v. *Torkington* (2). The word "free" seems to me most naturally to import, that, in some sense, and to some extent (though not defined), such "inhabitants of ancient messuages" do, or did anciently, participate in the "liberties" of the corporation; and, though the light thrown on that point by the charters and other documents is obscure and imperfect, it cannot, in my opinion, be said that there is none, or that it is of no importance.

The charter of Reginald de Vantort appears to me to point to

(1) Page 31. (2) 1 Q. B. 782.

the holders of burgage tenements (which may be presumed to be identical with, or to include the "ancient messuages") within the borough, as the original "burgesses of Essa." Their tenure was that described by Littleton (sects. 162–164). There was a "hundred court" belonging to the borough, in which they doubtless did suit. Queen Elizabeth's charter shews, that "the town and borough, with all and singular its suburbs, members and appurtenances," was vested in the body corporate; and the same charter granted to the corporation powers (doubtless the same with those previously exercised by "the burgesses of Essa") to take tolls, duties, and customs, and to make ordinances for the good government of all the inhabitants, and for the public good, common advantage, and good rule of the borough. In ancient boroughs there were often various degrees of participation in the borough franchises. (See *Hinks* v. *Clerk* (1) and *Mayor of Workingham* v. *Johnson* (2); also Madox, 'Firma Burgi," p. 269.)

It is now proper to consider the objection, stated in the 16th paragraph of the special case, "that an usage to dredge oysters without stint, for the purposes of sale or otherwise, in a several fishery, is unreasonable and destructive of the fishery, and does not raise any presumption of any royal grant or charter;" and the finding, in the same paragraph, that "The said usage does, in fact, tend to the destruction of the said oyster fishery, and, if continued, will destroy the same."

This last statement must of course be taken in conjunction with the 9th paragraph, which finds that the privilege, claimed by the free inhabitants of ancient messuages within the borough, had been annually exercised from time immemorial down to the year 1876; and what Lord Ellenborough said as to by-laws (in *Rex* v. *Ashwell* (3), seems to apply here, in principle; viz., that "the long continuance of a by-law, though it would not legalize it if it were in itself illegal, is fair evidence to shew that there is no intrinsic inconvenience in it, at least the acquiescence of the corporation in it, for above two centuries, is a fair answer to any theoretical argument of inconvenience."

(1) 2 Lev. 252. (2) Cas. temp. Hardwicke, 284.
(3) 12 East, 29.

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Authorities were cited at the bar: *Clayton* v. *Corby* (1); *Bland* v. *Lipscombe* (2); for the purpose of shewing that, if the claim were to a common of piscary, it ought to be made with some limitation or restriction, and that an indefinite claim to destroy the subject-matter (e.g. by taking away minerals which are part of the soil and freehold) cannot be supported in law as a profit à prendre in alieno solo. But, in the view which I have taken of the present case, it is not one of common of piscary, or of any other kind of profit à prendre in alieno solo; so that the objection, if it is of any force at all, can only be to the reasonableness of the presumption of fact, which your Lordships are asked to make. Considered in that light, the objection does not appear to me to be of any serious weight. The tendency to the "destruction" of the oyster fishery, spoken of in the special case, can mean no more than what must always be in the power of the public, where there is a general public right of fishing, or of any owner (whether absolute or limited), where there is a several fishery, namely, the exhaustion of the fishery, by taking excessive numbers of fish. Fish (whether floating or shell-fish) are not part of the soil or freehold. Their capture is merely the ordinary mode of the perception of those fruits and profits which a fishery produces. They grow, and are reproduced continually from spat and spawn; and if it is true that a fishery might possibly be exhausted by excessive fishing, it is only in the same way that a field may be exhausted by over-cropping. If the corporation had taken the fishery upon condition or trust that the free inhabitants of ancient messuages should be at liberty to fish without stint, for sale or otherwise, at all seasonable times throughout the year, the possibility of the exhaustion of the oyster beds by an improvident use of that privilege would not have been a valid objection to such a condition or trust; and, if not, it cannot be so, when the right is more limited. The usage, in this case, although it is to take oysters "without stint, for the purposes of sale or otherwise," is not unlimited; being confined to a particular class of persons, viz., the "inhabitants of ancient messuages within the borough" (whose number would not be capable of indefinite increase), and to a particular time of the year, varying between a minimum of

(1) 5 Q. B. 419. (2) 4 E. & B. 713.

seven and a maximum of twelve weeks. It must also necessarily be subject to any general restrictions, by statute law, as to taking the spat, spawn, and young brood of oysters, and to any reasonable regulations, consistent with the substance of the right itself, which the corporation may think fit to make, by by-law or otherwise, as to the manner of exercising it, such, e.g., as those restrictions relating to the size of oysters proper to be taken, which are found in the leases to Clemens and Dunsford, of 1774 and 1867.

My opinion is that the question in this case being altogether one as to the true nature, character, and conditions of a prescriptive title, established by evidence of user and enjoyment only, the whole user which has prevailed from time immemorial until now, and not only that part of it which is in favour of the respondents, may be, and ought to be, taken into account. That user, taken as a whole, appears to me to establish a title in the respondents to a several fishery; not, however, an absolute and unqualified title for their own sole benefit, but one qualified by a trust or condition in favour of the free inhabitants of ancient tenements within the borough, in accordance with the usage stated in the 9th paragraph of the special case. I therefore think that the order appealed from ought to be reversed.

The principle on which I have arrived at this conclusion, would not, in my opinion, be applicable to such a case as *Lord Rivers* v. *Adams* (1), in which, if the defendants had alleged the plaintiff to be their trustee, that allegation would have been met by the production of the plaintiff's title-deeds, shewing that he held under conveyances made to him and his ancestors (in the usual way in which titles to land are established in this country), without any trust. Against such a title, a trust could not, in my opinion, be presumed from any evidence of mere fishing in a stream which passed, and of which the plaintiff had possession, under those conveyances.

I must move your Lordships that the order under appeal be reversed, and that judgment in the action be entered for the appellants, with costs in both the Courts below and the costs of this appeal.

(1) 3 Ex. D. 361.

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EARL CAIRNS :—

My Lords, I have arrived at the same conclusion.

There were several questions argued, both here and in the Court below; and I think it desirable to mention them for the purpose of explaining that I should be very far from attempting to call in question the law as applicable to those questions. In the first place, I agree with the view of the Common Pleas Division that the free inhabitants of ancient messuages in Saltash cannot be presumed to be incorporated so as to be capable of prescribing for a profit à prendre in alieno solo. In the next place I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a profit à prendre in alieno solo. I think it also to be clear law that you cannot claim by prescription anything which could not have a lawful beginning. And I think it also clear that a fluctuating and uncertain body cannot claim a profit à prendre in alieno solo, and indeed cannot be the grantee either of a several fishery or of any other kind of real property. Upon all those questions, therefore, nothing that I am going to say will raise or suggest any kind of doubt.

But, in the first place, upon the evidence it appears to me clear that the corporation have established a right (I do not go into the evidence, because my noble and learned friend has referred to it) to a several fishery in the river, subject to whatever may be the just inference to be derived from the statements in the 9th paragraph of the case. [His Lordship read the paragraph.] Therefore, your Lordships have on the one hand the conclusion from the evidence of a title to a several fishery on the part of the respondents, and you have this unqualified statement of the exercise, from time immemorial, of the defined right as I have read it, on the part of the appellants. The question seems to me to be, How are those two titles to be reconciled?

I wish to put aside a suggestion which was made both in some parts of the argument and in some of the judgments in the Court below, that the facts in this 9th paragraph of the case are easily explained by supposing that the corporation had the right which I have stated, and that the exercise of this particular privilege on the part of the appellants was by permission, by licence, on the

part of the corporation, and that it was a revocable licence, which could be put an end to at any time. The special case is one from which your Lordships are entitled to draw any conclusion, as to matters of fact, which you think proper. It appears to me impossible to draw any conclusion such as the argument I have referred to would suggest, but that, on the contrary, we are bound to draw a conclusion of the opposite kind; because I find, with regard to the character of the acts of the appellants, the statement in the 16th paragraph that the respondents "contend that an usage to dredge oysters without stint for the purposes of sale or otherwise in a several fishery is unreasonable and destructive of the fishery, and does not raise any presumption of any royal grant or charter, and cannot be the subject of any prescription or right under the statute mentioned in the previous paragraph. The said usage does in fact tend to the destruction of the said oyster fishery, and, if continued, will destroy the same."

If that is the opinion of the respondents at the present time, it must have been the opinion of the corporation at all times; and it appears to me to be utterly incredible, and a thing the idea of which cannot for a moment be entertained, that with that impression on their minds the corporation allowed, as a matter of licence and permission, these practices, or the exercise of this right, described in the 9th paragraph of the case. But in addition to that, it appears to me that the statement in the 9th paragraph itself is inconsistent with the idea that the exercise of the right was by permission or licence on the part of the corporation; because the statement is that "the free inhabitants of ancient tenements in the borough have from time immemorial without interruption, and *claiming as of right*, exercised the privilege" in question. Those two circumstances, namely, the character of the acts (taken in connection with the opinion entertained by the corporation of the character of those acts), and the statement in the 9th paragraph, appear to me to dispose of the idea that this right on the part of the appellants was exercised by the licence of the corporation.

Then, coming to the titles of the two contending parties, and treating them as independent and separate titles, and repudiating the suggestion that the acts of the appellants are to be explained

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by a licence or permission on the part of the respondents, we have cast upon us the duty of reconciling in some way these two titles and these two parallel practices. I agree that we have not all the information which would be desirable as to the origin of the term "the free inhabitants of ancient tenements in the borough of Saltash;" but looking to what my noble and learned friend has referred to, the changes which this corporation has undergone from time to time, and the absence of the documents which might inform us precisely as to the nature of those changes, it appears to me that we must conclude that these "free inhabitants of ancient tenements in the borough of Saltash" were persons who originally had some share in the corporation and were in some way connected with the corporation, and that very probably these ancient tenements in the borough were those burgage tenements which are spoken of in the passage in Littleton to which my noble and learned friend has referred.

Then I come to the question, Is there any difficulty, in that state of things, in supposing what we are bound to suppose if it is possible, an ancient grant to the corporation of Saltash which would explain and reconcile the whole of the practice which we have thus laid before us? It appears to me that there is no difficulty at all in supposing such a grant, a grant to the corporation before the time of legal memory of a several fishery, a grant by the Crown, with a condition in that grant in some terms which are not before us, but which we can easily imagine—a condition that the free inhabitants of ancient tenements in the borough should enjoy this right, which as a matter of fact the case tells us they have enjoyed from time immemorial. A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in the very wide language of our courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it

creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities. That is a principle of the courts which was very well explained in a well-known case in the Court of Chancery which was decided when Lord Campbell was Lord Chancellor, a case with regard to Shakspeare's house, *Thompson* v. *Shakspear* (1). Indeed it is a principle which has been established in many cases.

I therefore agree with my noble and learned friend that we are bound here to suppose a grant of the kind which I have mentioned, that that grant would not be in any way contrary to any rule of law, and that the privilege which the appellants have enjoyed from time immemorial should be held to be founded upon a title of this kind. I therefore agree with my noble and learned friend that the decision of the Court below should be reversed.

LORD BLACKBURN:—

My Lords, the law is, I think, now perfectly settled on many of the points raised in this case, and I think that the learned counsel, who argued on each side with great ability, agreed that it was so, and did not either of them raise any false points.

The right of fishing in arms and creeks of the sea and in tidal rivers is originally lodged in the king, yet, as Lord Hale (2) says, "the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some subject hath gained a propriety exclusive of that liberty." One of the modes in which such a property can be gained by a subject is by prescription. And when it can be shown that a corporation which existed before the time of legal memory, and was therefore capable of taking by prescription, has as far back as living memory goes, enjoyed this exclusive right of fishery, excluding the common liberty, and dealing with it as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the proper presumption is, as was said in *Malcolmson* v. *O'Dea* (3), that the fishery being reason-

(1) 1 D. F. & J. 399. (2) *De Jure Maris, pars prima*, cap. 4.
(3) 10 H. L. 593.

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ably shown to have been dealt with as property must have become such in due course of law, and therefore must have come into existence before the time of legal memory.

The charter of Reginald de Vantort confirmed to "my free burgesses of Essa all their liberties and free customs hereunder written which they had in the time of my ancestors." This charter was inspected, ratified, and approved by Richard II. It is not dated, but as Reginald de Vantort was one of the great barons entrusted with enforcement of Magna Charta in the reign of Henry III., this charter is sufficient proof that the free burgesses of Essa, who had in the time of his ancestors the liberties, &c., which he confirmed to them, were a corporation existing before the time of legal memory, capable of having at that time, and not improbably actually having, a property in the fishery in that part of the sea, exclusive of the common liberty of the common people of England to fish there. The various charters to be found in the appendix to the case show that the liberties of this prescriptive corporation of Essa were from time to time confirmed, enlarged, and surrendered, and regulated, and the name of the borough was by Queen Elizabeth changed from that of the free burgesses of Essa to that of the mayor and free burgesses of Saltash. Her charter was surrendered by the then corporation to Charles II., who recreated the corporation, and George III., on the corporation becoming incapable of continuing itself, recreated it. There is nothing that I see in these various charters indicating that the corporation had ever an exclusive fishery, but there is nothing inconsistent with it, and it was not disputed at the bar that if there was a prescriptive right of exclusive fishery in the old corporation of Essa, it was properly and validly continued down to the present corporation, neither the change of name nor the surrenders and regrants in any way affecting their property.

The proof of enjoyment and acts of ownership by the corporation from 1680 downwards, now more than 200 years, is such as would beyond reasonable doubt, raise the presumption that the corporation had enjoyed this exclusive right of fishery from time immemorial, were it not for the 9th paragraph of the case. I have felt some difficulty from not being able to understand who "the free inhabitants of ancient tenements in the borough of Saltash"

are. I think it, however, quite clear that they are not the public at large, and that the acts of the free inhabitants of ancient tenements in taking oysters from the 2nd of February to Easter Eve are not acts of the public, as such, exercising, though only during a limited portion of the year, the general liberty, from which the plaintiffs claim to have by prescription the right to exclude them during the whole year; but only acts of a limited portion of the public claiming, in conjunction with the plaintiffs, to exclude the general public from this liberty.

What the acts of ownership and the fact found in the 9th paragraph taken together prove, is that during the greater part of the year the plaintiffs, and during the period between the 2nd of February and Easter Eve the plaintiffs and this limited portion of the public as tenants in common with the plaintiffs, have excluded the general public. I cannot, therefore, agree with Baggallay L.J. that the effect of this paragraph is to disprove the exclusive right of fishing, and show that all the public, and the defendants as part of them, have a liberty of fishing, either during the whole year or this limited portion of it. I think, however, that if the "free inhabitants of ancient tenements in the borough of Saltash" are capable of, in any way, acquiring a right of property in the fishery during this limited time, the presumption should be made that they have acquired it. If they cannot acquire such a property, the privilege, however long tolerated, may be withdrawn.

After the former argument it was, I think, agreed that this was the main question, and also that, in this case, it is to be considered on the assumptions that the plaintiffs have established the prescriptive right of fishery against the public, and that the defendants have not established that they were incorporated so as to be capable of prescribing in their own right.

I do not attach any weight to the statement in paragragh 16. I do not doubt its truth, but the unlimited right given at common law, in the absence of prescription, to all the public to fish would be even more likely to destroy the oysters. It affords an excellent reason why the mayor and aldermen, if they have the power—as, till I learned that the decision of this House was to be the other way, I thought they had—should put an end to the

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practice, or put it under such restrictions as will prevent the oysters from being extirpated; just as it affords a reason why the Legislature should put restrictions on the common law right; but does not prevent the mode of enjoyment from being legal, though wasteful.

Lord Blackburn.

I do not think it is disputed that the law was accurately stated by Willes J. in *Constable* v. *Nicholson* (1), where he says:— "The distinction is well established that by custom you may claim an easement to be enjoyed over the land of another, but you cannot claim a profit out of the land. The only difficulty in these cases is to ascertain what is a profit à prendre, and what an easement." And I think it was not disputed that a license to take and carry away fish for sale or otherwise is a license of a profit à prendre, which may at this day be created by a grant to a grantee, capable of taking an interest in the land: *Wickham* v. *Hawker* (2); nor that there was not any difference in this respect between a license by the owner of a prescriptive fishery in the sea, and the owner of a fishery in an inland river. And as such a right would now be created by grant to any body capable of holding such a profit in land, it can be prescribed for by any one who is capable of prescribing. I think the law is that though a custom may, if in other respects reasonable, establish a local law in a particular place differing from the common law, as a custom of gavelkind, or borough English, and many others which could not since the time of memory be created by anything but an Act of the Legislature, yet prescription can only be of something which could have a lawful origin at common law. This has often been laid down. I will only refer to *Dalton* v. *Angus* (3), where the Lord Chancellor (Selborne) says "The rule as to prescription is thus stated in Sir Francis North's argument in *Potter* v. *North*: "The law allows prescriptions, but in supply of the loss of a grant. Ancient grants happen to be lost many times, and it would be hard that no title could be made to things that lie in grant but by showing of a grant; therefore upon usage *temps dont, &c.*, the law presumes a grant and a lawful beginning, and allows such usage for a good title, but still it is but in supply of

(1) 14 C. B. (N.S.) 240. (2) 7 M. & W. 63.
(3) 6 App. Cas. 795.

the loss of a grant; and therefore for such things *as can have no lawful beginning*, nor be created at this day by *any manner of grant, or reservation, or deed that can be supposed*, no prescription is good." I have preferred quoting from *Dalton* v. *Angus* (1) because the italics are Lord Selborne's and shew what he thought, and I think, is the true test.

I have come to the conclusion that no form of grant, either ancient or modern, could be framed effectually giving to a fluctuating body a right in fee to a profit à prendre in land, either by a grant to that body direct, or by casting upon the grantee in fee of a several fishery, or of any other real property, an obligation to permit a fluctuating or uncertain body to take such a profit à prendre out of the subject of the grant. I say nothing, at present, as to whether such an obligation might not be enforceable as a trust. I confine myself to the question at law. But as I fear that in saying this I differ from the Lord Chancellor, and perhaps some others of your Lordships, I must give my reasons at more length than I should have otherwise done, especially as this question was not raised below, or at least not so raised as to lead the judges to discuss it.

Gateward's Case is reported in 6 Co. Rep. 60, and also in Cro. Jac. 152. The two reports quite agree, and, as I think, from them both it is to be collected that the reason, or at least a principal reason, why the custom was held bad was that it is repugnant to the nature of an inheritance in a profit à prendre in real property, that it should be vested in a body not capable of releasing or dealing with it; or at least, that it is against the policy of the law of England to allow it to be so vested. This is expressed in Cro. Jac., thus:—"Nor can such a common be released; but if one inhabitant should release, another which succeeded him might claim it; which is against the rules of law that an inheritance in a profit should not be discharged;" and the 4th resolution in 6 Co. Rep. is to the same effect. This, if it is the reason of the rule, is equally strong against the validity of a grant direct to such a fluctuating body of an inheritance in a profit in land. In *Constable* v. *Nicholson* (2) Willes J. said such a grant was not good. In *Chilton* v. *Corporation of London* (3) the

(1) 6 App. Cas. 795. (2) 14 C. B. (N.S.) 241. (3) 7 Ch. D. 740.

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Master of the Rolls said, "Such right cannot exist by grant." And I have not been able to find any case in which it has been said that such a grant would be good, unless where being from the Crown, and out of Crown property, it might be implied that the Crown created the grantees a corporation for this special purpose.

But it was argued that even if there could be no such grant direct to the fluctuating body, there might be an exception or condition in the original grant to the owners of the fee, requiring them to allow such a fluctuating body to take a profit à prendre out of the land so granted, and that such an exception or condition would be good, at least where there was such a relation between the grantees and the body as exists between a corporation of a town and the whole or a class of the inhabitants of that town. And cases were cited in support of this position which, as they seemed to the Lord Chancellor to support it, I have carefully examined, but which I do not understand as he does.

I think such an exception or condition, operating so as to give to that fluctuating body an inheritance in a profit in land, would be just as open to the objection that it was repugnant to the rules of law not to allow an inheritance in a profit in land to vest so as not to be capable of being discharged, as a direct grant. And it seems to me a strong authority against the validity of such an exception or condition that in every case where it was proved or admitted that there was a custom for a fluctuating body from time immemorial to take a profit à prendre in the soil of another, the presumption that the fee was originally conveyed subject to such an obligation would be quite as strong as in the present case, and the right of the fluctuating body if properly pleaded would be good, if good here; and in the recent case of *Lord Rivers* v. *Adams* (1), where no point turned on the pleadings, it ought to have been held that the fee was, before the time of legal memory, conveyed to the person whose estate Lord Rivers now has, subject to such an obligation. Yet there is no case of which I am aware in which such a claim has ever been made, certainly none in which it has been supported. *Cocksedge* v. *Fanshaw* (2)

(1) 3 Ex. D. 361.

(2) 1 Dougl. 118.

was not as I read it such a case. The claim there was not one relating to real estate at all, and *Gateward's Case* (1) could have no bearing upon it. The original grant of the Crown (presumed from long usage) to the corporation of London was to take a tax on all corn imported into the city. And the question was whether there could be a lawful origin for an exception, equally proved by ancient usage, of corn consigned to the freemen of the city. The Crown had, at common law, a right to take certain dues; some (either before or after legal memory) it granted to subjects, some it retained to itself, amongst others prisage of wine. Petty customs and town dues were very often granted to the municipal corporation, and the duty on corn sued for in *Cocksedge* v. *Fanshaw* (2) seems to have been granted to the city before the time of memory. Lord Hale, in his treatise concerning the customs, part 3 of his treatise De jure Maris, chapter 3 (I quote from Hargraves' Law Tracts, Dublin edition, A.D. 1787, page 125) says that such rights may be discharged or transferred, and "touching the former of these, how this discharge may be had, I shall set down the learning thereof in these ensuing propositions." Of these I shall only read the third. "A man, or town, or corporation may have a discharge of prisage by charter; and this is without all question, as shall be shewn. If the king grant to the mayor and commonalty of the city of London, quod omnes cives civitatis predictæ shall be free of prisage, though the charter be granted to the corporation, yet the exemption is well transferred to particular persons; and so in case of a discharge of toll, of putting into juries, and the like privileges of discharge."

This was solemnly decided in the great case of *Walter* v. *Hanger* (3). It is only material to say that the charter there relied on was after the time of legal memory, namely, in the 1st Edward III. And the same is the law as to a discharge by a subject to whom the right to take tolls had been transferred, as appears by the case of the mayor and commonalty of Nicholl against the mayor &c. of Derby, cited in *Mellor* v. *Spateman* (4). There the deed by which the mayor &c. of Derby covenanted with the mayor &c. of Nicholl not to take toll from the com-

(1) 6 Co. Rep. 60.
(2) 1 Dougl. 118.
(3) 1 Roll. Rep. 138; Moore, 833.
(4) 1 Wms. Saund. (6th Ed.), 344; Year Book, 48 Ed. 3, 17.

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monalty of Nicholl was produced in court, and it was held that an action lay by the corporation of Nicholl, though the damage was, it was argued, not to the corporation of Nicholl, but to the individuals from whom the tolls were taken. These cases are not in the slightest degree inconsistent with the reason which I think was the ground of *Gateward's Case* (1), for, in the first place, there was no profit taken in the soil or in any way connected with the soil; and, secondly, they were cases of discharge, not of grant. But they are very strong to shew that Lord Mansfield was quite right when he said that a grant to take tolls, subject to an exemption that they should not be taken from a certain class of freemen, would not have been void. In fact, there are many towns in England where the town dues are not exacted from the citizens of London or the cinque ports, the grant from the Crown under which the town dues are claimed having presumably been after the date of the exemptions by charter of the citizens of London and of the cinque ports from all dues.

Neither can I put the same construction, on the effect of the cases as to the form of pleading in prescription, which was put in the argument.

I have no doubt that a right to take a profit in alieno solo may at this day be granted in gross to a common person in fee, as indeed was done in *Wickham* v. *Hawker* (2), or in gross to a corporation in fee. And it may also be made appendant to other lands and so as to be conveyed along with them. And as such an interest could be created now, it is clear that it might be prescribed for. That is in no way inconsistent with what I take to be the reason of *Gateward's Case* (1), for such a person can always release or otherwise part with the right.

The owner of the profit à prendre may take it in person or by his servants. But he may also, whether the profit is in gross or appendant to land, get the benefit of his profit à prendre, by selling or letting an interest in it, for a longer or shorter term, to any person capable of taking such an interest, and so long as that interest endures the donee has an irrevocable license to take so much of the profit. And it is clear justice that the tenant or other person taking an interest ought, by good pleading, to be able to protect himself if an action be brought against him by the owner of the

(1) 6 Co. Rep. 60. (2) 7 M. & W. 63.

servient tenement for using the right whilst his interest endures, whether that interest was long or short. And the mode in which this should be done was the question in the case of the City of Coventry (1). At that time, according to Beatson's Political Index, Brian was Chief Justice of the Common Pleas, Littleton and Choke were puisne judges. Catesby was not a judge till some years later, and Genney and Pigot never were judges at all, and these three must have been sergeants and probably counsel for the parties. There the plea, as first pleaded, was that Coventry was an ancient city, and that all the citizens and inhabitants have had, from time immemorial, common for their beasts, levant and couchant, in the city in the locus in quo, and the defendant being an inhabitant put his beasts in. This was demurred to by Pigot, on the ground that an inhabitant in the city, who was at most a tenant at will, could not prescribe. It was agreed that this was so, and then the question discussed was how the plea should be amended. Littleton seems at first to have thought that the plea ought to be that there was a custom in the city of Coventry for the inhabitants to have common in the locus in quo, and that the issue should be on the custom; which would have been a direct authority against what was afterwards decided in *Gateward's Case* (2). But Brian pointed out that the custom bound the land and not the person, and after some discussion, in which Littleton referred to a case in the Exchequer which made against his first view, Choke said that the prescription was in the city, and that the inhabitant was in the same position as if he was tenant at will to the city, and that the "plea might be in this form, that the mayor and citizens have had the right of common for them and all the inhabitants in the city, and could not be otherwise." (3) On this, Pigot said that if such was the opinion of the Court, and the defendant would plead in that form, he would take issue on the plea. On a later day in the same term, Trinity Term (pl. 16), the defendant put in his plea, wishing to allege the common to be

(1) Year Book, 15 Ed. 4, Trinity Term, pl. 7.

(2) 6 Co. Rep. 60.

(3) As I may have mistranslated what Choke says, I insert the original Norman French: "Sic hic; chescun inhabitant est come tenant a volunt, issint que le prescription poit estre in tiel forme, que le major et les citizens de Coventre ont ewe comen, etc., pur eux et touts les inhabitants deins meme le city et nient autrement."

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for all beasts, and to leave out the averment that it was for beasts, levant and couchant, in the city. Pigot demurred on the ground, as I understand it, that the only reason that the inhabitant had common at all was that he was in the same situation as a tenant at will to the city, who had the city to which the common was appendant, and that therefore the plea was not good for any beasts save those levant and couchant in the city, and of this opinion were the Court. But Pigot said that a man might have common in gross attached to his person for beasts not levant and couchant. It seems plain that this was a case of common appended to the property in the city. And it certainly seems to me far from being an authority for saying that the inhabitant had a right, as against the city, to have this common. All that was decided was that a tenant at will of part of the dominant tenement might justify putting on the servient tenement, beasts which were levant and couchant on the dominant tenement. And this is, I think, the rule of pleading which is stated in the 6th resolution of *Gateward's Case* (1). There is a mistranslation or misprint, I do not know which, in the first edition of Coke's reports in English, which renders this resolution as printed unintelligible, and it has not been corrected in any of the subsequent editions. On reference to the original in French it will be found that Lord Coke wrote "as he who hath not ('auscun') any interest cannot have ('auscun') any common, so there is none who hath ('auscun') any interest, albeit but at will, and ought to have common, but what, by good pleading, he may enjoy it." And so in *White* v. *Coleman* (2), the mayor and burgesses prescribed properly enough for common of estovers for them and every inhabitant to burn in their houses. Common of estovers, from its nature, must be appurtenant to the land on which stand the houses in which they are to be burned. It is not necessary to inquire as to the ruling that this prescription was good for new houses, for that is not material in this case.

Bodies corporate may as such hold property in their corporate capacity, and it is, I think, incident to the nature of a corporation that there should be a power in the governing body from time to time to make ordinances for the management of that property. In the charter of Queen Elizabeth such a power is expressly given

(1) 6 Co. Rep. 60. (2) Freem. 134.

to the mayor and aldermen, or the major part of them, in convocation, to make from "time to time" such ordinances as to them in their discretion may seem meet, inter alia, "for the letting and demising of the lands, tenements, possessions, revenues, and hereditaments, given, granted, or assigned, or hereafter to be given, granted, or assigned to the mayor and free burgesses and their successors."

I suppose an ordinance directing that any property belonging to the corporation should, till further order, be enjoyed by the individual burgesses would be good enough; and in all corporations, whilst such an ordinance allowing the individual burgesses to enjoy a right of common existed, the burgesses could plead the prescription for their benefit to protect themselves, just as the tenants at will could, and I think the various cases referred to go no further than this. And if the ordinance thus made was revocable, it would be in no way inconsistent with *Gateward's Case* (1), and I am not aware of any authority for saying that such a by-law or ordinance, however ancient, was irrevocable, till some rights given to freemen and others were made so by the 2nd section of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76; see *Hopkins* v. *Mayor of Swansea* (2). But in no way can the 9th paragraph of the case be understood as stating a right that comes within that enactment. The corporation, I think, just like any other owner in fee, can deal with their property, and release or discharge it, unless they have conveyed it with the property in a part of the dominant tenement to someone else, and in that case the owner of the property to which it was appendant could release it. But whatever may be the meaning of the "free inhabitants of ancient tenements," it cannot be construed as meaning the owners of property to which the right of fishing was appendant. It is not impossible that there was once a by-law or ordinance allowing the inhabitants of the town freely to take oysters from the 2nd of February to Easter Eve; at least its existence would be a lawful origin for the practice stated in paragraph 9. But if there was one it was revoked when the mayor and aldermen made the leases in 1680, and whatever reason the inhabitants then living might have had to complain,

(1) 6 Co. Rep. 60. (2) 4 M. & W. 621.

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I cannot see why that revocation should not be effectual against those who have two hundred years after become inhabitants.

It was argued that at all events such a grant in favour of a fluctuating body might be worked out by treating the corporation as a trustee, and the intervention of the Court of Chancery. I speak with diffidence on a subject with which I am not very conversant, but I believe the rule against perpetuities, which is founded on nearly the same reason as that of *Gateward's Case* (1), applies to all trusts, except those in which the sovereign has the power, as being the ultimate trustee for charitable uses, of altering them. And though there are many cases to the effect that a trust for public purposes, not confined to the poor, may be considered charitable for many purposes, I do not know of any that say that such a trust as is now supposed would be taken out of the rule against perpetuities; and *Carne* v. *Long* (2) seems rather against it. As, however, the noble Earl (Earl Cairns) agrees with the Lord Chancellor that such a trust would not be held void in Equity as being against the rule against perpetuities, I do not venture to differ from them. But I do feel strongly that, after the numerous cases, from *Gateward's Case* (1) down to *Lord Rivers* v. *Adams* (3), in no one of which was it ever suggested that such a trust should be presumed, your Lordships should not presume it here, unless some distinction can be shewn why the corporation of Saltash should be presumed to be a trustee, and a private person owner of an estate in fee, like Lord Rivers, should not; which is hardly done to my satisfaction.

If, therefore, it depended on my opinion, the judgment of the Court of Appeal should be affirmed, and this appeal dismissed, with costs.

LORD WATSON :—

My Lords, the questions raised in this appeal belong to a department of English law with which I am not familiar; and I have experienced great difficulty in forming an opinion upon them, satisfactory to my own mind. Having, however, done my best to examine, for myself, the numerous authorities cited in the

(1) 6 Co. Rep. 60. (2) 29 L. J. (Ch.) 503. (3) 3 Ex. D. 361.

course of the arguments at your Lordships' Bar, I have come to the conclusion that the appellants ought to prevail; and seeing that the facts of the case and these authorities have already been fully commented upon, I shall endeavour very briefly, to indicate the considerations which have led me to that result.

The right of the corporation of Saltash to a several oyster fishery in the river Tamar is not established by any written, or, as it has been styled, paper title. The progressive charters, produced and founded on by the respondents, do carry back the origin of the corporate body, whose constitution has undergone several changes, to a period antecedent to Magna Charta; and their terms are not inconsistent with the fact of the corporation having acquired and possessed a right of several fishery beyond the time of legal memory. The existence of the right, its nature, and its extent, are all dependent upon evidence of user, and I apprehend, that the right asserted by the respondents can only be sustained, in so far as it is supported by such evidence.

I think it is proved, as matter of fact, that, subject to one notable exception, the respondents have from time immemorial had exclusive possession, as owners, of the several oyster fishery which they claim. But it is also established as matter of fact by the admission of parties—an admission which appears to me to be not only consistent with, but supported by, the evidence in the case—that, from the earliest period until the year 1875, concurrently with the possession had by the corporation, the free inhabitants of ancient tenements in the borough of Saltash, in each year, from the 2nd day of February to Easter Eve, took and carried away oysters from the fishery in question, without stint, for sale and other purposes. During that limited period, the corporation have never had exclusive possession, but a possession shared by the inhabitants of ancient tenements, by whom the privilege was claimed as matter of right.

In the face of the admissions made by the corporation, I cannot assume as matter of fact, that the privilege annually exercised by the inhabitants of ancient tenements had its origin in, and was dependent upon, an ordinance or any other form of license from the corporation. No doubt, the admission must be disregarded,

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if it can be shewn that it is contrary to fact, and that these inhabitants fished by leave of the corporation; but I can find nothing in the evidence which warrants that inference. Yet it may be matter of legal inference that their possession was attributable to mere tolerance, although, in point of fact, they fished as in the assertion of a right; and I think that must be the inference in law, unless it can be shewn that the right which they asserted is capable of having a legal origin. The real question, therefore, comes to be, whether the immemorial possession of these inhabitants of ancient tenements, which has been, in fact coeval with the immemorial possession of the corporation, ought in law, to be ascribed to a condition in favour of that class, qualifying the original grant of the fishery to the corporation.

The authorities conclusively establish that a fluctuating body, such as the inhabitants of ancient tenements within a borough, cannot by prescriptive possession, acquire for themselves a right to a profit à prendre in alieno solo. That was expressly ruled in *Gateward's Case* (1), and in *Lord Rivers* v. *Adams* (2); and it seems to follow from the rationes assigned by the judges who decided these and other similar cases, that a direct grant of a right of that nature to such a fluctuating body would not be effectual. On the other hand, it has been held in *Boteler* v. *Bristow* (3), and in *White* v. *Coleman* (4) that immemorial possession of a profit à prendre in alieno solo, by the inhabitants of a borough, not being necessarily burgesses, will enable them to defend themselves against any attempt on the part of the owner of the solum to interfere with their privilege, by ascribing their possession to the title of the corporate body, entrusted with the civic government of the borough in which they reside.

I humbly conceive that the claim put forward by the appellants, on behalf of the free inhabitants of ancient tenements within the borough of Saltash may be sustained, without violating the principles established by *Gateward's Case* (1), and the other authorities which have been referred to. I venture to think that the corporation of Saltash, and the inhabitants of its ancient

(1) 6 Co. Rep. 60.
(2) 3 Ex. D. 361.
(3) Year Book, 15 Ed. 4, 29 b, 32 b.
(4) Freen. 134; 3 Keb. 247.

tenements, do not stand to each other in the relation of strangers; and that the uniform and well-defined privilege of taking oysters, which that class of the borough community has immemorially enjoyed, has not been exercised, in alieno solo, within the meaning of these authorities. I am of opinion that it ought to be presumed, that the original grant of the fishery to the corporation was made subject to the condition that the class of inhabitants, which the appellants represent, should, in all time coming, possess and enjoy the right which is now claimed for them. Having regard to the relative positions of the corporation, and of these inhabitants, I can see no good reason why a qualification of the grant, expressed in these terms, should not have been held sufficient to constitute what, in the law of England, is known as a charitable trust, in the corporation for their benefit. And having regard to the facts proved or admitted in the present case, I can see no good reason for refusing to give effect to the presumption that the title of the corporation is and always has been, qualified by such a condition. If the respondents had been able to produce a grant of the fishery to the corporation, in terms absolute and unqualified by any condition, or if they had established the fact that, before the inhabitants of ancient tenements began to exercise their privilege, the corporation had the sole and exclusive possession of the fishery, there might have been room for holding that the appellants were now endeavouring to set up a claim adverse to the title of the corporation. But it is an admitted fact that the possession of the corporation, which constitutes its only evidence of title, has never been exclusive of, but, on the contrary, that it has been limited by and concurrent with the possession of these inhabitants; and I think the evidence establishes, that the privilege exercised by these inhabitants, was, until very recently, conceded to them as matter of right, and not by way of tolerance. In these circumstances, the presumption for which the appellants contend appears to me to be in fact reasonable and probable; and seeing that, in my opinion, it is not excluded by any legal principle, and will give a lawful origin to the privilege which the inhabitants of ancient tenements have immemorially enjoyed, I think the presumption ought to be sustained, and the judgment of the Court below reversed.

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LORD BRAMWELL:—

My Lords, in this case I agree entirely with the reasons and conclusions of the Lord Chancellor and in his application of the authorities he has cited. But having formed an independent opinion I had better shortly state it.

I think there never was a stronger case than that of the appellants, one that the law is more bound to sustain if it can. It is found that they have had and enjoyed, claiming as of right, from time immemorial that which they now claim. And their case is not that of a fixed and permanent body like a corporation, or of a lord of a manor claiming a title against the public; the claimants knowing their rights and always ready to extend them; the public ignorant of the rights, and of course made up of persons who cannot be said to represent those who lived before them. But the case is that of a varying body, against a fixed and permanent body, which had every interest to resist the exercise of that which was claimed against them. If, therefore, the appellants can have such a right, we ought to say they have it. I think they can have it, not as a right by prescription in alieno solo, but on other considerations.

The Crown before Magna Charta had no right of separate fishery in arms of the sea. Unless that was granted, and by the very grant created, all the Crown's subjects might fish. Now, why might not the Crown grant and create such right except as to certain persons at certain times, leaving them at those times to their common law right? I cannot see. I think it might well be. I think this is shewn by *Cocksedge* v. *Fanshawe* (1).

It is said that that case does not shew that, and that what was claimed and allowed there was not the right to have or take something,—only a discharge, a right to be free from something. But what is an exclusive right of fishery? It is a right by its very name to exclude. And what is the appellants' claim, but of a right at a certain season to be free from that exclusion? Lord Mansfield expressly puts the case of an exception, in the original grant of the tolls, in favour of freemen. If I am asked whether I believe there was such a grant with such an exception as I have supposed, I answer, I believe in the exception at least as much as

(1) 1 Dougl. 123.

in the grant. If such a thing could not be, then I would much rather believe and find that the corporation had no title, but had from time to time encroached on the public except in so far as the appellants and their predecessors had withstood them. In either view I think the appellants are entitled to our judgment.

As to the argument that a perpetuity which cannot be released is created, the answer is that the perpetuity is only that which all the Queen's subjects have, viz., to fish in an arm of the sea.

LORD FITZGERALD:—

My Lords, I have read the judgment of the Lord Chancellor, and I concur in it. It seems to me that the respondents have established a title in themselves to the several fishery in controversy exclusive of the public, but subject to a condition in favour of the free inhabitants of ancient tenements within the borough. We cannot get rid of the 9th paragraph of the case by any supposition that the privilege there so clearly stated and admitted was exercised merely by permission and at the will of the corporation or under a by-law capable of revocation, or otherwise than as a claim of right exercised as such, from time immemorial. The admission in paragraph 9 is so strong and so unequivocal that we must interpret it as the admission of the user of a privilege co-existent with the corporation itself, and exercised as of right and without interruption from time immemorial. We have only to inquire whether such a privilege could by any possibility have had a legal commencement, and we must presume everything in its favour. Although the charter of Reginald de Vantort is the earliest we have before us, he did not create the borough of Essa, for his is a charter of confirmation to the burgesses of that which they had in time of his ancestors, and we have no means of knowing what was the origin of the borough. We know not whether it was a borough by prescription and not by charter, or whether it may not have had its origin before the Conquest and before the introduction of feudal rule. Probably it was in its origin a baronial and not a royal borough, for there is no doubt that before, and for a considerable time after, the Conquest the great nobles claimed and exercised the prerogative within their own demesnes of conferring corporate privileges on their own towns. The recitals in

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the charter of Reginald de Vantort indicate that the borough of Essa was originally of that character, and one of very early origin.

One of the objects of creating such a corporation was to confer privileges on the members of the corporate body under one general description, and remove the necessity of a grant to each individual member, and hence it may not be unreasonable to infer that the original grant, whatever it may have been, to the corporation of Essa, was on condition that some privileges should be allowed to those, who, as a class, were either members of the corporate body, or lived within the territorial ambit of the borough, and, as such, subject to the corporate authority, and liable to perform corporate duties. Whatever the terms of the original gift may have been, or whatever the character of the privilege bestowed on the free inhabitants of ancient tenements in the borough, the fact seems necessarily to imply that the parties so described were then in some way or other capable of taking and enjoying the privilege.

The special case affords no interpretation of free inhabitants, and I understood from Mr. Mackenzie that he did not contend that it meant "freemen;" but I presume that he intended "freemen" in the modern and perverted application of the term. Probably "free" was used to distinguish the individual from one who was not free and was classed as a villein, to whom no privileges were usually conceded. Free inhabitant householders constituted a class well recognised in the early period, when the incorporation of towns first commenced, and they usually constituted the burgesses, or the body from whom the burgesses came. They usually contributed to the public charges whatever they were, and took their part in bearing the public duties. They participated usually in the benefits conferred on the town and became subject to its duties. The free inhabitants of ancient tenements were probably either originally members of the corporation itself, or a recognised class within the borough, on whom privileges were conferred in respect of their having erected houses within its limits, and being inhabitants or residents therein.

There are many instances to be found, amongst ancient records, of grants of privileges to a class within a corporation.

I see nothing unreasonable in presuming that the prescriptive

grant to the corporation of Essa was subject to a condition, that the free inhabitants of ancient tenements within the borough should be permitted to enjoy the privilege in controversy.

The appellants do not claim adversely to the right of the corporation, or in the sense that their claim should be interpreted as a claim adversely to a profit à prendre in the inheritance of another. They claim not adversely to, but through, the corporation; they assert no independent title in themselves, but insist that the corporation should faithfully observe the condition on which the original gift to them was made.

As to *Gateward's Case* (1) I may say that I am no admirer of it, nor do I entirely appreciate its reasoning, or the wisdom of its conclusions. Probably if the same questions had arisen in the present time, unfettered by authority, it might be found very difficult to reach the same results. However that may be, we do not interfere with that case, or its authority, which is now well established in law. We leave it exactly as we found it.

We were in the course of the argument pressed very much with the difficulty that the appellants' claim, if established, could not be released, and amounted to a perpetuity. I think that difficulty has already been answered, and it is satisfactory to bear in mind that the inheritance itself is in mortmain in the corporation, and that no evil can ensue from this condition.

Order of the Common Pleas Division, and order appealed from, reversed; judgment for the appellants, with costs in both the Courts below and of this appeal.

Lords' Journals 1st August 1882.

Solicitors for appellants: *Wedlake & Letts.*
Solicitor for respondents: *William Bohm.*

(1) 6 Co. Rep. 60.

[HOUSE OF LORDS.]

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INMAN STEAMSHIP COMPANY, LIMITED APPELLANTS.

AND

JAMES BISCHOFF AND OTHERS . . . . RESPONDENTS.

Insurance (Marine)—Freight—Loss—Perils of the Seas—Causa proxima—Charterparty—Condition precedent.

A ship was chartered for time on monthly hire: the charterers agreeing to pay the freight during employment and efficient performance of the service, and the owner covenanting that the ship should be seaworthy during the continuance of the charter: provided that if at any time it should appear to the charterers that the ship became inefficient it should be lawful for them to put her out of pay, or to make such abatement by way of mulct out of the hire or freight as they should adjudge fit. The owner effected a time policy of insurance "on freight outstanding." During the time the ship became inefficient through perils of the seas, and the charterers refused to pay freight after that date. The owner having brought an action on the policy:—

Held, affirming the decision of the Court of Appeal, that on the true construction of the charterparty the efficiency of the ship was not a condition precedent to the earning of the freight; that the pecuniary loss was caused by the charterers availing themselves of the abatement clause, and not by the perils of the seas; and that the underwriters were not liable.

APPEAL from a judgment of the Court of Appeal in favour of the respondents (1), reversing a judgment of Brett L.J. in favour of the appellants.

The facts are set out in the report of the trial before Brett L.J. (1) and in the judgment of Lord Selborne L.C. in this House.

July 11, 14. *French* and *Benjamin* Q.C. for the appellants:—

Before insuring the respondents had notice that the freight was under a Government charter, and therefore of the terms which were as usual in such charters. Efficiency was a condition precedent to the right to freight: that was so even in *Havelock* v. *Geddes* (2) where there were no such clauses as these for putting the ship out of pay or discharging her.

[LORD BLACKBURN referred to *Beatson* v. *Shanck* (3), not cited in the Court below.]

(1) 6 Q. B. D. 648. (2) 10 East, 555.

(3) 3 East, 233.

The appellants had no claim against the charterers except perhaps for a wrongful discharge and for not being taken on again after the repairs, for what happened justified the Government in paying no more freight. The clauses were inserted to prevent any question as to reasonableness or unreasonableness in rescinding the contract, the Government paying higher rates than other people. The freight was lost through the ship striking on the rock; i.e. through perils of the seas: *Jackson* v. *Union Marine Insurance Co.* (1)

Cohen Q.C. and *Barnes* (*C. Russell* Q.C. with them) for the respondents:—

The insurance was not on "chartered freight" with all the incidents of the charterparty, but on "freight" as usually understood: 2 Arnould Mar. Ins. 5th ed. p. 977. The effect of the charter is that without an act of the Government determining the freight it would run on. Efficiency was not a condition precedent: *Geipel* v. *Smith* (2); *Hadley* v. *Clarke* (3); *Ripley* v. *Scaife* (4). Perils of the seas were not the sole cause of the loss: the intervention of the Government in determining the freight was the cause. Such a loss is not within the ordinary sea risks: 2 Arnould Mar. Ins. 5th ed. p. 715; *Mercantile Steamship Co.* v. *Tyser* (5); *Beatson* v. *Shanck* (6); *De Vaux* v. *Salvador* (7); *Ionides* v. *Universal Marine Insurance Co.* (8); *Hadkinson* v. *Robinson* (9); *McSwiney* v. *Royal Exchange Assurance Corporation* (10); *Taylor* v. *Dunbar* (11); *Philpott* v. *Swann* (12); *Everth* v. *Smith* (13); *Anderson* v. *Wallis* (14). This is an attempt to turn the insurance into one against the exercise by the Government of their right to abate by way of mulct out of the freight.

July 15. *Benjamin* Q.C. replied.

The House took time for consideration.

(1) Law Rep. 10 C. P. 125, 148.
(2) Law Rep. 7 Q. B. 404.
(3) 8 T. R. 259.
(4) 5 B. & C. 167.
(5) 7 Q. B. D. 73.
(6) 3 East, 247.
(7) 4 A. & E. 420.
(8) 14 C. B. (N.S.) 259.
(9) 3 B. & P. 388.
(10) 14 Q. B. 634.
(11) Law Rep. 4 C. P. 206.
(12) 11 C. B. (N.S.) 270.
(13) 2 M. & S. 278.
(14) 2 M. & S. 240.

H. L. (E.) Aug. 1. LORD SELBORNE L.C.:—

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INMAN STEAMSHIP COMPANY v. BISCHOFF.

My Lords, the question in this appeal is, whether a loss of freight by the exercise of a power of mulct or abatement reserved by charterparty to the charterers, which power in this case arose and was exercised by reason of the ship being temporarily rendered inefficient for the service on which she was engaged by perils insured against, is a loss for which the insurers are liable, under an ordinary time policy, "on freight outstanding." It has been held, by the Court of Appeal, that they are not so liable, on the ground that the perils insured against were not the proximate cause of the loss.

Although the charterparty is not mentioned in the policy, nor is the freight described as chartered freight, an insurance on freight must necessarily have reference to some contract of affreightment, under which, during the time covered by that policy, freight might be earned; and to ascertain what the freight insured was, in case of loss, the actual contract of affreightment must necessarily be regarded. In this case the insurers had express notice, by the letter of the 19th of February 1879, in which the order for the insurance was given, that the *City of Paris*, the ship mentioned in the policy, was an Inman steamer, then about to proceed on a voyage to Natal on Government charter. There were, at that time, hostilities in progress between this country and the chief of Zululand, and the Government charter was for the use of the ship as a transport to convey troops and stores. That charter had reference to the general regulations for Her Majesty's transport service, and the special terms contained in it were in substance similar to those which had been long in use in Government charters for similar purposes, as appears from the case of *Beatson* v. *Shanck* (1). Under these circumstances it appears to me that the question arising upon the policy ought to be determined in the same way as if the charterparty had been seen by the insurers and referred to in the policy; though not, of course, so as to extend the contract of the underwriters, by any unnecessary implication, to anything not properly covered by the express terms of the policy.

(1) 3 East, 233.

The charterparty (dated the 20th of February 1879) was for the service and employment of the ship as a transport, on monthly hire, for the term of three calendar months certain, and thenceforward until the Board of Admiralty should give notice of discharge; such notice to be given when the ship was in port within the United Kingdom. The shipowners contracted to keep the ship in every respect seaworthy and fit for the service in which she was engaged; and the Board of Admiralty agreed to pay for the hire and freight of the ship, at the rate of 25*s.* per ton per calendar month, during such time as the ship should be continued in Her Majesty's employ, and should duly and efficiently perform that service, upon certificates, and by monthly instalments, with certain reserves, in the manner therein mentioned; one month's freight being paid in advance. This agreement, however, of the Board of Admiralty was subject to a proviso, thus expressed: "That if, at any time or times thereafter, it should be made to appear to the Commissioners, that any delay had been caused or had accrued by breach of orders or neglect of duty, or that the said ship had become incapable from any defect, deficiency, or breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case it should and might be lawful to and for the said Commissioners to retain in arrear the pay of the ship for two months as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they should adjudge fit and reasonable." There is nothing else which I think material in the charterparty. Upon the construction of this charterparty, I am of opinion that it was not a condition precedent of the contract of the Board of Admiralty to pay the monthly hire and freight of the ship, that she should "duly and efficiently perform the service" for which she was engaged; (*Boone* v. *Eyre* (1); *Havelock* v. *Geddes* (2)). I am also of opinion that the ship could not be discharged from that service (without the consent of the shipowner) elsewhere than within some port of the United Kingdom; and that the power reserved to the Commissioners to "put the ship out of pay," for any of the causes mentioned, had reference only to a retention of the monthly payments,

(1) 1 H. Bl. 273, n. (2) 10 East, 555.

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which ought otherwise to have been made, so that no exercise of that power could result in a loss of freight. The power, therefore, upon the exercise of which the present question depends, is that of making "such abatement by way of mulct out of the hire or freight of the said ship" as the Commissioners should adjudge fit and reasonable; being the same power which, in the case of *Beatson* v. *Shanck* (1), already referred to, was adjudged by the Court of Queen's Bench to be valid in law. This, according to the terms of the charterparty, was a power depending upon a judgment to be exercised, not by any officer or officers in charge of troops or stores on board the ship, but by the Commissioners for executing the office of Lord High Admiral.

The facts which are material are these. The ship proceeded with troops and stores to Simon's Bay, and there, on the 21st of March 1879, she struck upon a rock, receiving such serious injury that she was rendered unseaworthy and incapable of efficiently performing the service for which she was engaged, until she had received extensive repairs, which were not completed (so as to make her again seaworthy and fit to sail or to perform the service contracted for) until the 23rd of May following, which was after the expiration of the time covered by the insurance. The freight down to the 21st of March 1879, when she struck on the rock, was duly paid. On the 17th of April 1879, Captain Adean, the senior naval officer in Simon's Bay, instead of granting the usual certificate on which monthly payments were to be made according to contract, noted, on the form provided for that purpose, that the ship had been "inefficient since 21st March 1879, having touched the Roman rock and sustained much damage;" also, that the "*City of Paris* was discharged from Her Majesty's service 17th April 1879, having been retained so long on account of removal of Government stores, &c." The troops and stores on board had, in fact, remained in the ship until they could conveniently be transferred to other vessels, an operation which was not completed by the local agents of the Government until the 17th of April 1879.

The agents of the Government having declined to continue the employment of the ship, she returned to England in July 1879;

(1) 3 East. 233.

and a correspondence between her owners and the Board of Admiralty or their solicitors, which had been commenced when she was on her voyage homeward, was continued till the 2nd of August 1879. The owners did not profess to be able to insist upon any legal claim, but they asked for equitable consideration from Her Majesty's Government; and the Board of Admiralty ultimately decided to make them some allowance in respect of the expenses of the voyage homeward, but declined to pay freight for the period subsequent to the 21st of March 1879.

Having regard to the construction and legal effect of the charterparty, it appears to me that the acts of Captain Adean at Simon's Bay, and the form of certificate signed by him on the 17th of April, may be laid out of the case, inasmuch as the charterparty did not authorize the Board of Admiralty, and still less authorized their local agents, to discharge the ship from the service in which she was engaged, until she had returned to the United Kingdom; and the power of making an abatement by way of mulct out of freight was reserved only to the Board themselves, and cannot be regarded as having been finally exercised by them until after the ship's return to the United Kingdom. If the shipowners had voluntarily consented to a variation of the terms of the charterparty, involving a relinquishment of their claim to freight (which does not appear to have been the case), this could not have thrown upon the insurers any liability to which they would not otherwise have been subject: (*Everth* v. *Smith* (1); *Philpott* v. *Swann* (2)).

The result is, that, in my opinion, a right to the freight in question must be deemed to have accrued under the terms of the charterparty, but to have been subsequently in July 1879 defeated, under the power of abatement by way of mulct reserved by the contract to the Board of Admiralty. It has not been without doubt or (I must add) without reluctance, that I have come to the conclusion that this is not a loss so directly, proximately, and immediately resulting from the perils of the seas insured against, as to make it payable under the terms of the policy by the insurers.

The general principle of *causa proxima, non remota, spectatur*, is intelligible enough, and easy of application in many cases; but that there are cases in which a too literal application of it

(1) 2 M. & S. 278. (2) 11 C. B. (N.S.) 270.

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would work injustice, and would not really be justified by the principle itself, is apparent from the observations of Pollock C.B. in *Montoya* v. *London Assurance Company* (1); of Erle C.J. in *Ionides* v. *Universal Marine Assurance Company* (2), and from *Bondrett* v. *Hentigg* (3). Nor do I think that the question can entirely depend upon the difference between a condition precedent (without which the right to freight would never accrue), and a condition subsequent, by which it might be defeated. The observations of Bramwell B. at the conclusion of the judgment in *Jackson* v. *Union Marine Insurance Company* (4), and what took place during the argument in that case, as stated by Cleasby B. (5), appear to me to be adverse to so narrow a view. If, in the present case, the other terms of the charterparty being the same, a power had been reserved to the charterers or their agents to determine the contract and their liability to further freight, on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea, for which the insurers were liable. Nor would it, in my opinion, have made any difference, although provision might have been made by the contract for the continuance of the troops and stores in the ship, after the exercise of the power to determine the contract, until such time as they could be conveniently landed or transferred to other vessels. But between such a case, and that of a subsequent mulct under a special power, such as that contained in this charterparty, after freight had been earned which (unless the power of mulct were exercised) would be payable under the contract, there seems to me to be an important difference. The principle of such cases as *Hadkinson* v. *Robinson* (6), *Taylor* v. *Dunbar* (7), and *McSwiney* v. *Royal Exchange Assurance Corporation* (8) seems to be here applicable, and obliges me to conclude that the risk of loss by the exercise, under such circumstances, of such a special power is different from the

(1) 6 Ex. 458.
(2) 14 C. B. (N.S.) 286.
(3) Holt, N. P. 149.
(4) Law Rep. 10 C. P. 148.
(5) Page 127.
(6) 3 B. & P. 388.
(7) Law Rep. 4 C. P. 211.
(8) 14 Q. B. 634.

risk of loss by perils of the seas, and ought to have been insured against in some more special manner, if it was the intention of the parties that it should be covered by the policy. I do not dissemble that there appears to me to be something of refinement in the distinction which the rule laid down by the authorities, as applied to the particular facts of this case, obliges me to make; but, though refined, it seems to be a real distinction, and to justify the judgment of the Court below.

Upon the whole, therefore, I am unable to differ from the opinion, which is entertained by others of your Lordships who heard this appeal, and I must move your Lordships to affirm the judgment appealed from, and to dismiss the appeal, with costs.

LORD BLACKBURN:—

My Lords, this is an action on a time policy in the ordinary form, entered into in the name of Joyce, Shore, & Co., who were brokers for the plaintiffs "for and during the space of three calendar months, commencing the risk on the 20th day of February 1879, and ending on the 19th of May 1879, both days inclusive," "on the *City of Paris* steamship." The subject-matter of insurance is specified as "on freight outstanding," the perils are the usual perils, including those of the sea. The Defendants are underwriters who had subscribed this policy.

The question is whether, under the circumstances after stated, there has been any loss of freight against which the underwriters are bound by their contract to indemnify the plaintiffs.

The adventure in respect of which the plaintiffs intended to make this assurance was under a charterparty under seal, made on the 20th of February 1879, between the Commissioners of the Admiralty (for and on behalf of her Majesty) of the one part, and Charles F. Ellis (for and on behalf of the now plaintiffs, owners of the *City of Paris*) of the other, by which the owners let and the commissioners hired and took on freight the *City of Paris* "for service and employment as a transport on monthly hire, for the space of three calendar months certain, and thenceforward until the commissioners" shall cause notice to be given to the plaintiffs or the master in charge of the ship "that she is discharged from Her Majesty's service, such notice to be given when the said ship

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is in port in the United Kingdom." The first month's pay was paid in advance. Before the underwriters agreed to the insurance they were informed that the *City of Paris* was the Inman steamer about to proceed on a voyage to Natal on Government charter, and they might if they pleased have seen that charter, so that there would have been no ground for setting up any defence on the ground of non-disclosure or concealment, and no such defence was set up. But though the underwriters knew that this was the adventure upon which the ship was bound, and that there was such a charterparty, under which what was meant to be insured would accrue, it is not in any sense accurate to say that the policy is to be read as if the charterparty was set out in it so as to affect its construction. The construction of the policy remains that the underwriters are to make good any loss occasioned to the subject-matter of the insurance in this policy described as "freight outstanding." "Freight," says Lord Tenterden (*Flint* v. *Flemyng*) (1), "as used in the policy of insurance, imports the benefit derived from the employment of the ship;" so that description covers the monthly hire of the ship for time. But as soon as it is ascertained that the policy attached on the hire under a particular charterparty, the charterparty must be read in order to see how the subject matter was affected by the misfortune which happened. Under one charterparty a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the assured's right to recover the hire of the vessel whilst she was disabled. Under another, such a temporary disablement might deprive the shipowner of all claim for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second I do not see how it could properly be denied that there was such a loss. But the construction of the charterparty may be such, and this is the case now at bar, that it is a nice question whether the pecuniary loss which the assured have sustained in consequence of a peril of the sea is one which does or does not occasion a loss of the hire. If it does not occasion such a loss, though the consequence may be one which might have been

(1) 1 B. & Ad. 48.

insured against by an apt description, (for there are always underwriters to be found who, if satisfied as to the premium, will underwrite any risk), the underwriters on freight have not insured against it. Whether the individuals who subscribed this policy would have refused to insure at all on such a risk as being too speculative for them, or would have been willing to insure on an increased premium, or would have been willing to insure without any increase of premium, I cannot tell. If what has happened is not a loss of freight within the meaning of the policy, they have a right to refuse to indemnify against it.

The construction therefore of this charterparty is all important. I will now read what I think the material parts of it, slightly abridging them, and then state the facts proved, as to which I think there is now no dispute. I may first observe that I do not think it makes any difference in the construction of the charterparty that the charterers here are acting on behalf of Her Majesty, nor that the regulations of Her Majesty's transport service are incorporated in and form part of the charterparty; and that two cases, that of *Beatson* v. *Shanck* (1), and *Havelock* v. *Geddes* (2), are very material authorities as to the principles on which this charterparty should be construed.

After the passage which I have already read, the charterparty proceeds: "And the shipowner covenants with the commissioners in manner following, that is to say, that the said ship shall at all times during the continuance of this charter be in every respect seaworthy and properly equipped and found at the cost of the said owners; and that the said ship shall proceed to such ports or places (with or without convoy at the option of the commissioners) as the commissioners or any officer authorized by them shall from time to time order and direct, and so from time to time during the continuance of the said ship in Her Majesty's service; and that in the performance of all services required to be performed under the regulations aforesaid, the said master and his crew with his boats shall be aiding and assisting to the utmost of their power; and that the master of the ship shall obey all orders and instructions which he may receive from the commissioners, or any officer authorized by them, and the master shall in all respects

(1) 3 East. 233. (2) 10 East. 555.

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comply with the said regulations for Her Majesty's transport service. In consideration of which covenants and conditions it is agreed by the said commissioners for and on behalf of Her Majesty in manner following, that is to say:—That the shipowner shall be allowed and paid for the hire and freight of the said ship at the rate of twenty-five shillings per ton per calendar month for the number of tons above-mentioned" (i.e. 3081 tons), "during such time as the said ship shall be continued in Her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged. That the shipowner shall on signing and sealing hereof be entitled to receive a bill for one calendar month's freight upon account, and in part payment according to the rate and tonnage aforesaid: provided it be certified by the inspecting officer that the said ship is ready to proceed on Her Majesty's service. And after the said ship shall have been in the said service two calendar months from the commencement of the said service, and the shipowner shall have produced to the said commissioners a certificate in the required form, the shipowner shall be entitled to receive a further bill for a moiety of one month's freight upon account as aforesaid; and after the said ship shall have been in the said service three calendar months, a further bill for another moiety of one month's freight upon account, and each month after during the ship's continuance in the said service, if such certificate as aforesaid shall have been produced, the said second named party shall be entitled to receive a further bill for one month's freight on account, and shall be paid the balance of freight on the passing in office of the requisite accounts and documents after the discharge of the said ship, all which aforesaid payments shall be made in England. Provided always, and it is hereby agreed and declared, that if at any time or times hereafter it shall be made to appear to the said commissioners that any delay has been caused or has accrued by breach of orders or neglect of duty, or that the said ship became incapable from any defect, deficiency, breach of orders, or from any cause whatsoever to perform efficiently the service contracted for, then and in every such case it shall and may be lawful to and for the said commissioners to retain in arrear the pay of the ship for two months, as aforesaid, and to put the said ship out of pay, or to make such

abatement by way of mulct out of the hire of the freight of the said ship as they shall adjudge fit and reasonable."

I do not think any other part of the charterparty is important.

The facts proved and admitted are, that the *City of Paris* began her service on the 18th of February 1879, and the owners were paid a month's hire in advance. She sailed with troops and stores for the Cape, and when entering Simon's Bay, on the 21st of March 1879, she struck upon a rock, and sustained such injuries as rendered her incapable of performing efficiently the services of a transport till they were repaired. The troops were taken out and sent on to Natal; the stores were left in her till they also were taken out on the 17th of April. The date at which the bill for a moiety of the third month's pay would have become payable was the 18th of April 1879, and on the 17th of April 1879 a certificate was given on the regular printed form used in the transport office, the portions filled in in writing being indicated by italics:— "Monthly certificate of the efficiency of a transport. I certify that the *City of Paris,* transport No. 11 of 1974 tons register, Mr. John Harry M. Fulton, master, is at this date in Her Majesty's service, fit in all respects for the service on which she is employed and complete according to her charterparty, and the transport regulations in hull, spars, stores, machinery and boilers and crew (including a competent clerk), and that the master has, since the date of the last certificate, conducted himself properly, been obedient in command, and complied with the regulations and instructions furnished for his guidance. Dated at Simon's Bay, the 17th day of April 1879. E. S. Adean, Captain and Senior Naval Officer. *City of Paris was discharged from H. M. service 17th of April* 1879 *having been retained so long on account of the removal of Government stores &c. Inefficient since 21st of March* 1879, *having touched the Roman Rock and sustained much damage.* Date on which the preceding certificate was granted, 17th March 1879" (1). And on the same day this memorandum was handed to the master: "Memorandum 17th April 1879. The hired trans-

(1) "Note. Should the ship have been in any way inefficient for the service since the date of the last certificate the particulars are to be noted hereon. See Art. 173 of the Regulations for Her Majesty's Transport Service, and Art. 33 of the Instruction for Masters of Transport."

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port, No. 11, being now cleared of all government stores and fittings, you are acquainted that the *City of Paris* is this day discharged from Her Majesty's service. Dated on board Her Majesty's ship *Tenedos* in Simon's Bay, this 17th day of April, 1879. E. S. Adean, Captain and Senior Officer. To the master of the hired transport, No. 11, *City of Paris*."

The ship was repaired as speedily as possible, and was made efficient. It is not quite clear on the evidence whether this was on the 15th of May 1879, four days before the policy expired by efflux of time, or some days later, and I do not think it material. She was tendered to the Government but refused, and she came home. Then the owners, on the 16th of June 1879, applied to the Director of Transports, who referred their claim to the Solicitor of the Treasury, who reported that they had no legal claim beyond the 21st of March 1879. The Commissioners of the Admiralty paid the owners for the hire of the ship up to that day, and, as a matter of grace, paid for the coal consumed in bringing the *City of Paris* home from Simon's Bay. The owners say, and it seems quite clear say truly, that had it not been for the accident, which was a peril of the sea, they would have received pay from the 21st of March 1879 till the 20th of May 1879, when the policy expired by efflux of time, and that they did not receive it at all. And they claim against the underwriters on freight to be indemnified against this in proportion to their subscriptions. Brett L.J. was of this opinion, and the plaintiffs before him had judgment against the underwriters on their respective subscriptions. The Court of Appeal reversed this judgment.

It is obvious that the pecuniary damage (a word which I use in preference to loss, to avoid prejudging the question) to the assured was precisely the same whether the hire for these two months was, in consequence of the peril of the sea, never earned, or whether the commissioners had, in consequence of the peril of the sea, a right to make abatement by way of mulct to such amount as in their judgment was fit and reasonable, and to deduct that from the pay, and thought it fit and reasonable to deduct the whole. But the difference to the underwriters is considerable. In the first case the hire is clearly lost by the peril insured against. In the other, I think it cannot properly be said that the hire has

been lost at all, though the assured have had an equivalent mulct levied out of it.

The Courts below have not entered into the question of what was the construction of the charterparty in any detail, Lord Bramwell, in the Court of Appeal, rather putting the judgment on the maxim "causa proxima non causa remota spectatur," which is, no doubt, perfectly good law, and saying something about "causa causans" and "causa sine qua non." I must own that I have always sympathised with Lord Colonsay in *Rankin* v. *Potter* (1), where he says: "Something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes"; which, I think, he did not use as a term of eulogy. I think, as he did, that when we get a clear view of the fact it is best to keep clear of such philosophical mazes. And, as I think, the question here is not what was the proximate cause of a loss of freight, but whether there was any loss of freight.

It seems to me clear that neither Captain Adean at the Cape, nor the commissioners at home, nor any one else, had power to discharge the *City of Paris* before the three months certain for which she was hired. Had she totally perished, so that she never could have been employed at all again, the hire would have ceased from the time of her destruction, but here use was made of her as a store ship till the 17th of April, and after she was repaired she was capable of performing the work of a transport efficiently.

In *Havelock* v. *Geddes* (2), where by the terms of the charterparty the defendants had bound themselves to pay a monthly hire, and the shipowners had, as here, covenanted, without any exception of the perils of the sea, to keep the vessel efficient, Lord Ellenborough says, at p. 566, "The question, then, is whether, because the plaintiff has undertaken to keep the vessel tight, &c., the defendants have a right to deduct anything out of the freight they are to pay in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired. And we are of opinion that they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were

(1) Law Rep. 6 H. L. 160. (2) 10 East. 555.

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making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charterparty is, that whilst those repairs are going on, the ship is to be considered in the defendant's service, and the defendants liable to continue their payments." No question as to insurance arose in that case, but it seems to me clear that, if Havelock had insured his freight, he could not have recovered anything in respect of the peril of the sea causing the necessity for those repairs, for no part of the freight was thereby lost; any damage occasioned to the ship would be borne by the underwriters on ship; any extra expenses to which he was put in consequence of his covenant would have to be insured by a special description.

It is, however, argued that in this charterparty the words in the covenant to pay the freight "during such time as the said ship shall be continued in Her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged," amount to such a stipulation as Lord Ellenborough refers to.

In Maude and Pollock on Shipping (3rd ed. p. 235) it is said, I think quite accurately, "It is often difficult in construing charterparties to ascertain whether particular stipulations amount to conditions precedent. This is to be determined by seeking for the intention of the parties as apparent on the instrument, and from the surrounding circumstances, and by applying the ordinary rules of construction to each particular case. It does not depend on any formal arrangement of the words, but on the reason and sense of the thing as it is collected from the whole contract. Generally speaking, any stipulation which goes only to a portion of the consideration, or, in other words, the breach of which would deprive the party who has a right to insist upon it of a portion only of the benefit of his contract, will be construed not to be a condition precedent. It must, however, be recollected that this rule although a very useful one, is only a rule of construction, or means of discovering the intention of the parties, to be applied where the words will bear either sense. For it is clear that the courts will not make contracts for the parties, and that if they use language which distinctly shews that they intend such a stipula-

tion to be a condition precedent, it will be so construed. Constructions, however, leading to absurd and unreasonable results will be avoided, if this can be done without violence to the terms used, because, where the intention is not clearly expressed, the parties are not to be presumed to have meant to make an absurd or unreasonable contract." In this case the government did receive some benefit from the employment of the ship between the 21st of March and the 17th of April, though she was disabled from duly and efficiently performing the service for which she was engaged, and cases may easily be supposed in which they might have received more. I am, therefore, strongly inclined to think that the words relied on, even if they stood alone, would not amount to a condition precedent. But it is not necessary to decide the point, for the words are materially qualified and their effect altered by what follows, which shows that the charterers were relying on the stipulation construed in *Beatson* v. *Shanck* (1). There in a transport charter the provision, as stated in the report, was that "upon the loss of time, breach of orders, or neglect of duty by the said master, or from the ship's inability to execute or proceed on the service on which she might be employed, being made to appear, the said commissioners should have free liberty and be permitted to mulct or make such abatement out of the freight and pay of the ship as should be by them adjudged fit and reasonable."

The words in the charterparty now before us are slightly different, and there is introduced a power to the commissioners to "retain in arrear the pay of the ship for two months, as aforesaid, and to put the ship out of pay," which, as I think, must be construed as enabling them not to discharge the ship, but to withhold the giving of the monthly bills previously stipulated for for two months, during which time the commissioners would have time to consider how they should use the power to make abatement by way of mulct out of the pay. I think that *Beatson* v. *Shanck* (1) puts the proper construction upon this clause. If any of the specified cases, including inability from any cause whatever to perform efficiently the service contracted for, arises, the parties have agreed that the commissioners may make such

(1) 3 East. 233.

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abatement by way of mulct as the commissioners shall adjudge fit and reasonable. All that a Court of law can inquire into is whether there was such a case as to give the commissioners jurisdiction; if there was, even if they make an abatement which, in the opinion of the Court, was neither fit nor reasonable, the Court cannot interfere. And I think that the commissioners may properly take into consideration many things, besides the mere inability, so that it is not at all clear that the resolution to pay nothing for the period from the 21st of March to the 17th of April, though the ship was then retained in the service, and actually used, might not be reasonable and fit, though it certainly seemed to me at first to be an inequitable resolution. But can it be said that the making such an abatement by way of mulct or fine, not necessarily because of the peril of the sea, is a loss of the freight, though power is given to retain and levy it out of the freight? I think not, any more than the power conferred on the Admiralty Court to give damages against the ship for a collision occasioning damage to another ship, and enforce the payment by means of a proceeding in rem against the ship, is a loss of the ship. That was *De Vaux* v. *Salvador* (1). The prejudice which the owner of the ship sustains in the last case is a consequence of the peril of the sea, the collision, and it may be and every day is insured by a running down or collision clause now in common use, but it is not a loss of the ship. It may be doubted if the prejudice which the shipowners in this case sustained from the abatement by way of mulct is so direct and immediate a consequence, for it may have been imposed, or, at least, its amount increased, for many other reasons. And it might be difficult, though I think possible, to frame a clause to cover it; but I think that it should be insured, if at all, under a clause framed for the purpose, as it is not a loss of freight. I therefore think that the judgment of the Court of Appeal is right, and should be affirmed.

LORD WATSON:—

My Lords, the terms of the policy of the 22nd of February 1879 appear to me to be sufficient to include freight to be earned

(1) 4 A. & E. 420.

under a time charter. And, seeing that the respondents when they accepted the insurance had notice that the *City of Paris* was under a contract of charterparty, I am of opinion that the policy attached to the freight therein stipulated, whether they did or did not choose to inform themselves of the particulars of the contract; and consequently, that the respondents became liable for such part of that freight as might be lost through any of the risks insured against during the period covered by the policy.

The *City of Paris* commenced her services under the charterparty on the 18th of February 1879, one month's freight being paid in advance; and, upon the 21st of March, whilst conveying troops from this country to Natal, she struck upon a rock in Simon's Bay, and sustained such damage that she could not proceed on her voyage until substantial repairs had been made. These repairs were not completed so as to admit of the vessel putting to sea, until a few days before the policy came to an end, on the 19th of May 1879. Meantime the troops and stores which she carried were transferred to other vessels, an operation which lasted from the 21st of March to the 17th of April, and, on the latter date the senior naval officer in command at Simon's Bay formally intimated to her captain that the *City of Paris* "is this day discharged from Her Majesty's service."

There are two facts in the present case which have not been disputed. The first of these is, that the injury sustained by the vessel in Simon's Bay, and her consequent detention there whilst undergoing necessary repairs, were due to perils of the seas, within the meaning of the policy. The second is, that the Commissioners of the Admiralty, who were the charterers, have not paid and refuse to pay freight subsequent to the 21st of March 1879. Accordingly the only question which arises for decision is, whether the freight, which the vessel, in the absence of any casualty, would have earned between the 21st of March and the 19th of May 1879, is lost freight for which the insurers are liable. In order to appreciate the merits of that question, it is necessary to consider very carefully the terms of the charterparty.

The engagement of the vessel was for an indefinite period,

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three calendar months being the minimum. Notice of discharge was only to be given when the ship was in a port in the United Kingdom, and the owners were bound to keep her "staunch and substantial both above water and beneath, and in every respect seaworthy" at all times during the continuance of her charter. These stipulations seem to indicate that it was in the contemplation of both parties that the owners should from time to time, during the currency of the charterparty, make such repairs upon the ship as were necessary to her efficiency as a transport.

The clauses of the charterparty which bear upon the payment of freight are somewhat peculiar, and it is necessary to notice them specially, because the decision of the present case appears to me to depend upon the effect to be given to them. Freight is made payable at a monthly tonnage rate during the time the ship is in Her Majesty's employ, and "shall duly and efficiently perform the service for which she is hereby engaged." The first month's freight is to be paid in advance. At the end of the second month the owner, on producing a certificate in due form, is entitled to a bill for a moiety of a month's freight, and at the end of the third month, upon production of a similar certificate, he becomes entitled to a bill for another moiety. At the end of the fourth, and each succeeding month, a bill for one month's freight is receivable on a certificate being produced. The result of this arrangement is this that, after the expiry of the first three months of the vessel's engagement, the charterers have always from one to two months' freight already earned in their hands, and it is provided that the owner "shall be paid the balance of freight on the passing in office of the requisite accounts and documents after the discharge of the said ship." Then follows the provision that, if at any time it shall be made to appear to the commissioners that any delay has been caused by breach of orders, or that the ship became incapable, from any cause whatsoever, to perform efficiently the service contracted for, it shall be lawful for them, "to retain in arrear the pay of the ship for two months as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they shall adjudge fit and reasonable."

If the facts of the present case were such as to bring it within

the principle of *Jackson* v. *Union Marine Insurance Co.* (1) that would afford an easy solution of the only question in issue. In that event the Commissioners of the Admiralty would have been, at common law, entitled to rescind the contract of charterparty, in respect that the sea risk encountered by the *City of Paris* in Simon's Bay had made the object, which the contracting parties had in view, commercially impossible of attainment. But there is really no analogy between the case of a charter for a single voyage, with a particular cargo, and that of a charter indefinite as to time, place, and cargo; and, moreover, it appears to me that, on a fair interpretation of this charterparty, it was mutually contemplated that the ship might be injured by perils of the sea, and that, whenever that occurred, she was to be repaired.

In my opinion, neither the Commissioners of the Admiralty, nor their officials at Simon's Bay, had a legal right to terminate the contract and to discharge the *City of Paris* from Her Majesty's service, upon the 17th of April 1879. It is, however, unnecessary to consider whether any liability would have attached to the insurers, if the commissioners had insisted upon their right to discharge the vessel upon the 17th of April, and had declined to pay freight upon that footing alone. The commissioners ultimately disallowed all claim for freight after the 21st of March, but allowed the cost of coals consumed on the homeward voyage; and the case was presented to your Lordships, on both sides of the bar, according to my understanding of the argument, as if the commissioners had not discharged the vessel at Simon's Bay, but had disallowed freight from and after the 21st of March, in consequence of her inefficiency to perform the service for which she had been engaged. In this aspect of the case it could hardly be maintained that the commissioners were not empowered, by the terms of the charterparty, to refuse payment of freight subsequent to the 21st of March 1879; but, when that is conceded, the question still remains whether the payments so withheld constitute lost freight, within the meaning of the charterparty.

The appellants, in the first place, maintain that, by the terms of the charterparty, the due and efficient performance of the

(1) Law Rep. 10 C. P. 125.

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service for which the vessel was engaged formed a condition precedent to the earning of freight. I am unable so to read the contract. The language of the leading clause with respect to freight does not appear to me to be fairly susceptible of that construction; and any such construction is quite inconsistent with the clause which follows, giving power to the commissioners to make an abatement by way of mulct out of the hire or freight of the ship. Reading the two clauses together, I think it is clear that freight was to run during the whole period of the vessel's engagement, but that the commissioners, in the event of delay occurring, or of the vessel becoming inefficient, were to have the power of declining to issue monthly pay bills,—which I take to be what is meant by putting the ship out of pay,—and of retaining the freight, deducting from its amount, on final settlement, any sum which they, in their discretion, might fix, as a reasonable mulct, in respect of such delay or inefficiency.

If I am right in my construction of the charterparty, the case turns upon a very narrow point. The inefficiency of the vessel was admittedly due to perils of the sea, which were within the risks insured by the policy; and if it had been expressly stipulated in the charterparty that freight should cease to be payable so long as the ship was incapable from that cause of efficiently performing her contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight through the perils insured against. But that is not the present case. The abatement of freight is not, in my opinion, necessarily dependent upon the fact that the vessel has been disabled by sea risks. It is entirely dependent upon the discretion of the Commissioners of the Admiralty, who are not limited, in the exercise of that discretion, to considerations arising out of the casualty which has occasioned delay. They may quite legitimately take into account in determining whether they will or will not inflict a mulct, the conduct of her owners under a totally different contract of charterparty, and many other considerations equally foreign to the ship or freight insured. In these circumstances, whilst I am conscious that the question is one of great nicety, I am unable to regard a disallowance of freight, which may be legitimately made on such considerations, as lost freight

in the proper sense of that term. It appears to me that the deduction from freight, which the commissioners are empowered to make, is in truth and substance a penalty imposed upon the shipowner, which they are entitled to levy out of the freight retained in their hands.

I am accordingly of opinion that the judgment of the Court of Appeal ought to be affirmed.

LORD FITZGERALD:—

My Lords, I have had the advantage of reading the judgments of my noble and learned friends which have my entire concurrence.

The charterparty is in some parts rather obscure and difficult of interpretation. It is obvious why it was provided that the notice of discharge should be given in a port in the United Kingdom, for if it were otherwise the ship might have been discharged at some very remote place, and left to bear the heavy cost of an unproductive voyage home. No notice of discharge was given according to this provision of the contract, and as the time for giving it would not be reached until after the expiration of the "three months certain" it does not require further consideration in the present action.

As the charter was not limited in time and might continue for a considerable period, it seems plain that its duration was not to be determined by any necessity arising for repairs, unless at least the repairs proved to be of so extensive a character and likely to occupy so much time as practically to put an end to the objects of the charter, and thus entitle the charterers to abandon the undertaking.

The proviso in the charter which has been so much commented on, and which is the foundation of your Lordships' judgment, seems to me to have conferred on the commissioners large powers of a judicial character, to be exercised according to judicial discretion. They do not seem either by themselves or their officers to have directly and formally exercised those powers. It is not pretended that they determined to retain in arrear the pay of the ship for two months, and to put the ship out of pay; nor did they formally and directly adjudge and declare that it would be fit and reasonable to make any abatement by way of

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mulct out of the hire or freight of the ship. The only act formally done on the part of the commissioners, if the officer doing them had authority to bind the commissioners, appear from the two documents of the 17th of April 1879, Nos. 8 and 9 in the appendix. In No. 8 are to be found two statements, that the ship had been inefficient "since 21st March 1879, having touched the Roman Rock and sustained much damage," and that the "*City of Paris* was discharged from H.M. service, 17th April 1879, having been retained so long on account of the removal of Government stores, &c.," and No. 9 is a notice to the master that the ship "being now cleared of all Government stores" "is this day discharged from Her Majesty's service." I have not been able to discover that Captain Adean had authority to discharge the ship from the service. Under such circumstances I should have had some difficulty in coming to the conclusion that the commissioners had legally exercised the powers conferred on them by the contract of affreightment, and had adjudged it to be fit and reasonable "that there should be a mulct out of the freight." It seems however to have been assumed on both sides that the commissioners did in some form or other exercise their powers, and did eventually adjudge it to be fit and reasonable to make, and did "make an abatement by way of mulct out of the hire or freight" equivalent to the two months' freight which otherwise had been earned. It is on this the plaintiffs seek to maintain the present action.

I concur in the opinion that there has been no loss of freight within the terms of the policy. The freight was earned, but the plaintiffs have been deprived of it by the commissioners in the exercise of the discretionary powers which the contract of affreightment vested in the commissioners. That was a risk against which the insurers did not insure. If however there was a loss of freight, it would remain to be considered whether "peril of the sea" was the immediate cause of the loss. The maxim "in jure non remota causa sed proxima spectatur" applies specially to marine insurances, so that in order to entitle the claimants to recover here, the loss must be a direct and not the remote consequence of the peril of the sea. The touching on the Roman Rock was a peril of the sea, and probably, but for that, the ship would have completed her undertaking, and earned her two months' freight, but it does not

follow that the touching on the rock and consequent injury were the causa causans. The freight was not necessarily and directly lost by that calamity and the consequent necessity for repairs. The plaintiffs were deprived of the right to their freight, if they were so deprived, by the action of the commissioners, or their officers, under the special provisions of the charterparty. The loss was not by the perils of the sea, but was occasioned by the contract.

I concur in the opinion of Bramwell L.J. in this case that the loss was not the necessary and proximate effect of the perils of the sea, and that the plaintiffs have failed to establish the immediate relation of the one to the other.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 1st August 1882.

Solicitors for appellants: *Gregory, Rowcliffes, & Co.*, for *Hill, Dickinson, & Lightbound, Liverpool.*

Solicitors for respondents: *Waltons, Bubb, & Walton.*

[HOUSE OF LORDS.]

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THE COUNTESS OF ROTHES AND ANOTHER APPELLANTS;

THE KIRKCALDY AND DYSART WATER-WORK COMMISSIONERS . . . . . } RESPONDENTS.

Construction of Statute—Damage to Lands by extraordinary Flood—Escape of Water from Reservoir—Liability of Water Commissioners—Damnum fatale—Kirkcaldy and Dysart Waterworks Act, 1867 (30 & 31 *Vict. c.* 139), *ss.* 43, 49.

By the 43rd section of the Kirkcaldy and Dysart Waterworks Act, 1867, it was provided that the commissioners under the Act "should be bound to make good to the Countess of Rothes and her heirs, &c., all damages which may be occasioned to her or them, by reason of or in consequence of any bursting, or flow, or escape of water from any reservoir, or aqueduct, or pipe, or other work connected therewith" which may be constructed by the commissioners. The Countess is proprietrix of lands situated below the site of one of the reservoirs, and during an extraordinary rainfall a great quantity of water was continuously discharged from the reservoir, through a waste weir into the watercourse of a burn, and did much damage to the Countess's lands. She claimed compensation. There was no failure or insufficiency of the works and no negligence:—

Held, reversing the decision of the Court below (Lord Blackburn dissenting), that on the construction of the above clause the Countess was entitled to compensation for damage by flood waters from the reservoir, no matter how caused.

Per LORD WATSON:—Statutory provisions, such as here, in a local and personal Act must be regarded as a contract between the parties, whether made by their mutual agreement, or forced on them by the legislature.

APPEAL from the Second Division of the Court of Session, Scotland. The Countess of Rothes, one of the appellants, is proprietrix of the Rothes estates in the county of Fife, lying on the southern slope of the Lomond hills. She raised this action with the consent of her husband, who is the other appellant. The respondents are the water commissioners of Kirkcaldy and Dysart, acting under the provisions of the Act of 30 & 31 Vict. c. 139, known as the Kirkcaldy and Dysart Waterworks Act, 1867.

Under that Act the inhabitants of Kirkcaldy and Dysart were authorized to make reservoirs on the Lomond Hills, and to carry

out the necessary works for the supply of water to these two places, and for a compensation supply to mill owners on streams the water of which was impounded.

Two reservoirs were constructed, one the Drumain reservoir, and the other the Ballo reservoir, about a mile from the appellants' property.

A watercourse known as the Lothrie Burn runs for a length of about three miles through the pursuers' estate, the water of which is impounded in the above-mentioned reservoirs. To supply the place of the water so impounded the commissioners are bound (sect. 39 of the Act of 1867) to send down the course of the Lothrie Burn a compensation supply of at least 750 gallons per minute. This compensation supply is supplied by the reservoir known as the Ballo reservoir, from which sluices open into the channel of the Lothrie Burn. The overflow of the Ballo reservoir also is directed into the Lothrie watercourse by means of a byewash. In the month of August, 1877, there was an extraordinary rainfall in the gathering ground or watershed of the Lothrie Burn, and on the night of the 20th of August the water came down into the Ballo reservoir in greatly increased volume. The consequence was that the water in a large quantity flowed over the byewash in the channel of the burn below the reservoir. The byewash is about fifty-seven feet wide and two feet deep, and the overflow from it at the height of the spate was eighteen inches. No water had escaped over the embankment. The flow caused considerable damage to the pursuers' property.

Sect. 43 of the Act of 1867 enacts:

> The commissioners shall be bound to make good to the said Countess of Rothes and her heirs and successors, from time to time, all damages which may be occasioned to her or them, by reason or in consequence of any bursting, or flood, or escape of water from any reservoir, aqueduct, or pipe, or other work connected therewith, which may be constructed or laid by the commissioners; and the right to claim payment of such damages and expenses shall not be lessened by the powers conferred by this Act as regards inspection and seeing to the sufficiency of the works, either during the construction or at the completion thereof, or by anything that shall have been done under or in consequence of these powers.

The 49th section is in the following terms:

> All claims of compensation for land taken or used, and for laying pipes or

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constructing works within or upon the estate of the said Countess of Rothes, and all claims of her, or her heirs or successors, for compensation or damages through flood or escape of water, or flooding or bursting of any of the reservoirs authorized by this Act, or works connected therewith, or for altering, enlarging, or increasing the number of pipes, or inspecting and repairing pipes to be laid by the commissioners, which shall from time to time be made by the said Countess of Rothes, or her heirs and successors, against the commissioners, and all questions which may arise in relation thereto, shall be settled by arbitration in manner provided by the Lands Clauses Consolidation (Scotland) Act, 1845.

The appellants sought declarator, that "the respondents are liable to make good to them all damage which has been occasioned to their property by reason of the bursting, flood, or escape of water from the Ballo reservoir in August 1877; and that the respondents are bound to enter into arbitration with them in order that the amount to be paid as compensation may be fixed." They relied for this purpose chiefly on the 43rd section of the Act, which they contended rendered the respondents liable if any of the water which did the damage came from the reservoir, whether such flood was or was not due to the existence of the reservoir. They also contended that whether their construction of the section was correct or not, the Respondents were liable, in respect that the evidence shewed that the existence of the Ballo reservoir, and the negligence of the respondents in not regulating properly the quantity of water in the reservoir, materially contributed to the flood. But the charge of negligence they withdrew.

The respondents pleaded "the averments of the pursuers being unfounded in fact, the defenders are entitled to absolvitor."

The Lord Ordinary allowed the parties a proof of their respective averments in terms of the Evidence (Scotland) Act, 1866.

A proof having been adduced, the Lord Ordinary, on the 3rd of December, 1878, pronounced an interlocutor by which he assoilzied the defenders from the conclusions of the summons, and found them entitled to expenses.

The appellants reclaimed, and the Second Division (the Lord Justice Clerk dissenting), June 5, 1878, refused the note and adhered, with additional expenses (1).

The majority of the Court of Session were of opinion that it being clearly established in point of fact, that the reservoir was

(1) 6 Court Sess. Cas. 4th Series, 974.

in no way proved to be insufficient, the water commissioners were not liable in reparation.

The Lord Justice Clerk differed from the Lord Ordinary's interlocutor, and said that his difficulty arose not on the facts, but upon the general principle applicable to this question, and upon the construction of the statute, and then continued:

My opinion is, that the clause in the statute on which this case turns, constitutes an obligation upon the commissioners as part of the consideration for obtaining the statutory powers which they had not and could not have had otherwise—constitutes an obligation of absolute protection against the things mentioned in that clause. Now, it being assumed that there was a flood, the Lord Ordinary has found that this case is not within the clause I have referred to, and the ground upon which he has proceeded is that it does not appear that if the reservoir had not been there this damage would not have been caused. The only question, in the first instance, is whether the contingency expressed in the clause has occurred, that is, whether the pursuers have suffered injury by reason of the discharge from this reservoir, whether by bursting, or escape, or flood. On this question there can be no doubt whatever, so far as the circumstances are concerned. It is proved that on the 18th, 19th, and 20th of August, 1877, a large body of water was continuously discharged from this reservoir at a height of sixty feet above the bed of the stream, tearing up the solid masonry of the byewash, a structure about one hundred yards in length, and spreading over the banks of the stream below, where it inflicted the damage now complained of on the property of the pursuers. Now, in my opinion, that is quite sufficient to found this action, and I do not think any further inquiry either necessary or relevant. It is said, however, to be immaterial that the water was so discharged from the reservoir unless it can be also proved that if the reservoir had never been there the same amount of water, at the same height and under the same conditions, would not have flowed down the same channel and inflicted the same injury. It is needless to say that there is not a word in the statute to this effect. I see no reason for applying this singular condition to the right to recover damage done by flood any more than to injury done by bursting or escape. But if, from some unavoidable cause, the reservoir had been burst through—from lightning, or a waterspout, or any other singular cause—it might quite as reasonably have been contended, had a flood existed at the time, that the same or a greater amount of water would have come down had the reservoir not been there. But this view of the case, in my opinion, is entirely fallacious, first, because it places on the pursuers the burden of proving a fact which never can be proved; and secondly, because whatever the result might have been if the reservoir had never been made, it is quite certain, on the simplest natural laws, that the result must have been different from what actually occurred. To foretell before the event, or to assume in the absence of the event, the effects which might be produced by an unusual rainfall on a given stream is a problem wholly beyond the range of calculation. Water in flood is one of the most capricious of natural agents. . . . The only thing that to me appears certain is that the result with the reservoir there must have been different from what it would have been if the reservoir had not been there.

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On the whole matter, I thought it right to express that opinion, because I think this inquiry into what might have happened if the reservoir had not been there is wholly irrelevant, and, moreover, is inconsistent with the true construction of the 43rd section of the statute, which, in my opinion, makes it an absolute condition of the right to make the reservoir that damage arising from it shall be paid without inquiry as to the contingencies of which your Lordships speak.

The appellants appealed to this House. The respondents set out in their printed case that they admitted "that the question as to the true meaning of the 43rd section is a question of law, which in any case fell to be determined by the Court, and on which an appeal is properly taken to this House; but the question whether the damage was caused whole or in part by the respondents' works, or by their fault, is a matter to be determined by arbitration in terms of the 49th section of the Act."

When the case came before the Court below, the parties concurred in stating that they desired to have the dispute between them settled by the Court of Session rather than by an arbitrator, and it was upon that understanding that the judgment now under appeal was pronounced.

In these circumstances the respondents submit that the present appeal is not competent except upon the question as to the construction of the statute, see the cases of *Dudgeon & Martin* v. *Thomson & Patrick*, 1854 (1); *Craig* v. *Duffus* (2); *Robin et al.* v. *Hoby et al.* (3)."

At the hearing, 20th and 21st July,

Davey, Q.C., and *Webster*, Q.C., contended for the appellants:—

If the House took the view of the Lord Justice Clerk, then the interlocutors must be reversed; if of the Lord Ordinary and the majority of the Court below, then another question which is more or less of fact would arise.

On the first question, all that was necessary to prove under the 43rd section is, that if any damage was caused by water coming from the reservoir, Lady Rothes must be compensated; even although the damage was not in any degree caused by the reservoir, or the works connected therewith, but would have happened although

(1) 1 Macq. 714. (2) 6 Bell's App. 308.
(3) 2 Macq. 478.

the reservoir and works had never been completed. The Act of Parliament in giving the respondents the right to interfere with the Lothrie Burn, by constructing works necessarily to some extent endangering the property below, conferred on the Countess of Rothes a simple and complete protection against any flood or water coming from the new reservoir. The object of sect. 43 was to relieve Lady Rothes from embarking on any hypothetical and speculative inquiry such as that indicated by the majority of the Court below, namely, whether more water came down to the appellants' property than would have come down from natural causes if no reservoir had existed.

[They were not heard on the question of competency raised by the respondents. They cited *Fletcher* v. *Rylands and another* (1); *Nichols* v. *Marsland* (2).]

The Solicitor General (*Asher*, Q.C.), and *Benjamin* Q.C., for the respondents:—

The first question is, had Lady Rothes a claim under the 43rd section? (2.) Is it competent to review the facts? and (3), if it is competent, then is the judgment of the Court below correct?

[LORD BLACKBURN:—The House is satisfied that the finding of the Court below as to the facts was correct, and the only question which now remains is as to the construction of the statute.]

The construction put on the statute by the appellants is not sound, the true meaning of sect. 43 is that the respondents are liable for damage occasioned by reason of, or in consequence of, the existence of their works, but not for damage to which thei works in no way contributed.

Certainly Lady Rothes was not to be damnified by the compulsory powers given by the Act, but, on the other hand, compensation can only be recovered if an action would have lain had there been no Act at all. If the flood had not been caused or materially increased by the existence of, or some defect in the respondents' works, they are not liable, but the damage falls within the description damnum absque injuriâ, which cannot become the

(1) Law Rep. 1 Ex. 265; affirmed Law Rep. 3 H. L. 330.
(2) 2 Ex. D. 1.

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ground of an action: see *New River Company* v. *Johnson* (1); *Read* v. *Victoria Station and Pimlico Railway Company* (2); *Barber* v. *Nottingham and Grantham Railway Company* (3). [Their further argument will be found fully given in the opinions of the Lords.]

Davey, Q.C., in reply.

The House took time for consideration.

July 26. LORD BLACKBURN:—

My Lords, the question in this case depends entirely on the construction of two lines in the 43rd section of the Kirkcaldy and Dysart Waterworks Act, 1867, but though it lies in so small a compass, it is one on which there has been a difference of opinion in the Court below, and there is also one in this House.

The Act in question authorized the commissioners to impound the waters of an affluent of the Lothrie Burn in a reservoir, and thence by aqueducts and pipes and filtering works to carry a supply of water to the towns of Kirkcaldy and Dysart. It required them also to make a compensation pond called the Ballo reservoir, on the upper part of Lothrie Burn, and store up the water in it for the purpose of supplying compensation water to those interested in the lower part of the Lothrie Burn. The position and size of this Ballo reservoir is fixed with precision in the Act, and it is required that the works shall be securely made, and that a waste weir fifty feet wide shall be provided for the Ballo reservoir. So that the commissioners were left no discretion as to how they were to make and maintain this reservoir. If there came a fall of rain so great as to do more than fill the reservoir the surplus water must flow over the waste weir and thence flow down into the Lothrie Burn. To do anything to hinder this would have been a breach of the duty imposed by the Act upon the commissioners. What happened was, that there was a very unusual fall of rain, as much as six inches in three days, and the water flowed over the waste weir in a body eighteen inches deep, and this quantity of water raised the Lothrie and produced a

(1) 29 L. J. (M. C.) 93. (2) 32 L. J. (Ex.) 167.
(3) 33 L. J. (C. P.) 193.

flood, flowing from the reservoir certainly; though the works of the reservoir stood firm, and the water did not rise so high as to flow over the embankments.

The appellants are owners of the lands on both sides of the Lothrie Burn, up to a point 560 yards below the point where the water flowing from the Ballo reservoir joins the burn. The 43rd section of the Act is in these terms: "The commissioners shall be bound to make good to the said Countess of Rothes, and her heirs and successors, from time to time, all damages which may be occasioned to her or them, by reason of or in consequence *of any bursting, or flood, or escape of water from any reservoir, aqueduct, or pipe, or other work connected therewith,* which may be constructed or laid by the commissioners, and the right to claim payment of *such* damages and expenses shall not be *lessened by the* powers conferred by this Act as regards inspection and seeing to the sufficiency of the works, either during the construction or at the completion thereof, or by anything that shall have been done under or in consequence of these powers." I quite agree with the Lord Justice Clerk below when he says: "Now, my Lords, my opinion is, that the clause in the statute on which this case turns, constitutes an obligation upon the commissioners as part of the consideration for obtaining the statutory powers which they had not, and could not have had otherwise—constitutes an obligation of *absolute protection* against the things mentioned in that clause." The whole question in my mind is, what are we to understand as being the things mentioned in that clause? If the word "flood" as there used means any flood whatsoever flowing from the reservoir, it is beside the question to inquire if this was not more protection than Lady Rothes could reasonably ask for; she has in that view got it from the legislature, and the decision of the Court below is wrong. But the words "bursting or escape of water from any reservoir, aqueduct, or pipe," &c., are things which can only occur when the works have in some way proved not sufficient, and the commissioners have failed in doing what they were directed to do. And if the word "flood" is to be understood as limited, in the same way as the things which go before or come after, to flood occasioned by the works proving defective, and is not to extend to a flood the damage from which would have had to be borne by

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the appellants if there had been no works, and which flowed as it did from the works being made and maintained in the very way in which the legislature intended and indeed compelled the commissioners to make and maintain them, then the decision of the majority of the Court below was right.

I quite agree that no Court is entitled to depart from the intention of the legislature as appearing from the words of the Act, because it is thought unreasonable. But when two constructions are open, the Court may adopt the more reasonable of the two. I do not think it is possible to add much to the mere statement of the case. It will strike one mind in one way and another in a different one, and knowing, as I do, that my two noble and learned friends who heard the case differ from me, I should have said that they and the Lord Justice Clerk, whose opinion they adopt, were probably right, but as three of the Scotch Judges who heard the case below took the same view as I do, I am confirmed in my opinion, and think it due to them to state what it is. The decision of this House will, of course, be in conformity with the opinion of my two noble and learned friends.

LORD WATSON:—

My Lords, the only question which it is necessary that your Lordships should decide in this appeal depends upon the just construction of a single clause in a local and personal statute entitled "The Kirkcaldy and Dysart Waterworks Act, 1867."

The respondents, who are the commissioners incorporated for the purpose of executing the Act, are thereby empowered, inter alia, to impound and store up the waters of a small stream, called the "Lothrie Burn," and some of its tributaries; and with that view to construct two ponds or reservoirs, the one named the Drumain and the other the Ballo reservoir. The Drumain reservoir, which is upon a tributary of the Lothrie, is intended for the supply of water to the burghs of Kirkcaldy and Dysart. The Ballo reservoir, which has been formed by damming up the Lothrie Burn itself, is intended to compensate the owners and occupiers of lands, mills, and manufactories, and all other persons interested in the waters of the burn, and its tributaries and affluents, and the streams into which they flow, for the water abstracted by

means of the Drumain reservoir, and the pipes which connect it with Kirkcaldy and Dysart. The statutory obligation of the respondents is, to cause to be discharged from the Ballo reservoir into the channel of the burn, 750 gallons, or 120 cubic feet, of water per minute during each of the twenty-four hours of every day of the year.

The Lothrie Burn, at a point in its course from half to three-quarters of a mile below the Ballo reservoir, enters the Leslie estate belonging to the appellant, the Countess of Rothes, and runs through it for about three miles. There are no materials in the present case for determining whether the appellant, as an inferior heritor, could have objected to the construction of the Ballo reservoir by the proprietor of the solum, provided he had merely filled it in time of flood, and had thereafter permitted the natural flow of the burn to descend undiminished in volume. I see no reason, however, to suppose that the works which the respondents are authorized to construct could, of themselves, and apart from the uses made of them by the respondents, cause any alteration of the natural flow of the Lothrie Burn within the Leslie estate. But the appellants had an undoubted legal right to prohibit the abstraction of a single drop of water for the use of Kirkcaldy and Dysart, as well as any interference with the natural flow of the burn through or over the Ballo reservoir. Lady Rothes accordingly appeared, and procured the insertion of various clauses in the Act, designed for the protection of her interests, to the terms of which it is necessary to advert.

First of all, provision is made (sect. 40) for the construction of the works in a solid, substantial, secure, and workmanlike manner; and the appellant, and her heirs and successors, are authorized to insist on an inspection of the works not only during their execution, but at any time after their completion, by an engineer mutually agreed upon, or, failing agreement, to be appointed by the sheriff of the county. On the other hand, the respondents are laid under an obligation to execute the works, as such engineer shall direct, "so as to secure safety," and specially to provide a waste weir fifty feet wide for the Ballo reservoir. The purpose of these enactments obviously is to protect the appellants against the possibility of the embankments or sluices giving way, the

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function of the waste weir, or byewash, as it is also called in these proceedings, being to relieve the embankments from water pressure which might endanger their stability. Then follows the clause (sect. 43) with which we are immediately concerned. It provides that the respondents shall be bound to make good to the appellant and her heirs and successors, from time to time, "all damages which may be occasioned to her or them, by reason or in consequence of any bursting, or flood, or escape of water from any reservoir, aqueduct, or pipe, or other work connected therewith, which may be constructed or laid by the commissioners." By another clause (sect. 49), the terms of which I shall have to notice hereafter, it is enacted that the compensation payable under sect. 43 shall be settled by arbitration in manner provided by "the Lands Clauses Consolidation (Scotland) Act, 1845."

On the night of the 20th, or morning of the 21st of August, 1877, there occurred what the respondents on record describe as "a spate of extraordinary violence," in the upper part of the Lothrie Burn, which entered the Ballo reservoir, and thence flowed, by means of the byewash and compensation sluice, down the channel of the Lothrie Burn. The action in which this appeal is taken was instituted by the appellant on the allegation that the spate in question occasioned great damage to her property, and concludes (1°) to have it found and declared that the respondents are liable to make good such damage, and (2°) to have them ordained either to enter into a statutory arbitration in order to fix its amount, or to pay the amount as ascertained in the course of the action. It appears from the judgment delivered by Lord Ormidale, and it is not disputed, that, in the Court below, or at all events in the Inner House, "both parties concurred in stating that it was their desire to have the dispute between them settled in this Court under and in terms of the second alternative conclusion of the summons, in place of an arbitration under the Lands Clauses Act." Upon that agreement of parties I have only this observation to make, that it amounts, in my opinion, to nothing more than a waiver of their right to demand a statutory reference; and that the effect of the waiver is to confer upon the appellants the right to recover these damages by ordinary legal process. The respondents' contention that the effect of the waiver

was to put the case as regards damages extra cursum curiæ, and make a reference to the Court of Session, appears to me to be groundless; but that is a matter of little consequence in the view which I take of this case.

The appellant in the Court below maintained that the respondents were liable for the damage occasioned to her property by the spate or flood in question, upon these three grounds:—(1°) that the respondents are, by sect. 43 of the statute, made liable for damage occasioned by a flood coming from the Ballo reservoir, whether such flood be due to the existence of the reservoir and its works or not; (2°) that, assuming no such statutory liability to exist, the flood was materially increased, and its injurious effects aggravated by the respondents' works; and (3°) that the whole or a material part of the damage was due to the failure or neglect of the respondents to regulate properly the quantity of water in the reservoir, and its outflow from the compensation sluices. The Lord Ordinary, whose judgment was adhered to by Lords Ormidale and Gifford, the majority of the Second Division (the Lord Justice Clerk dissenting from their conclusion as to the first) rejected all these contentions, and assoilzied the respondents. The appellant, at your Lordships' bar, did not insist on the third proposition maintained by her in the Court below; and I am of opinion, with your Lordships, that the second, which involves a pure question of fact, was rightly negatived by the Judges of the Court of Session. That leaves for consideration only the first proposition, which raises a question of law, upon the construction of the 43rd section of the Act of 1867.

The Lord Ordinary and the judges who agreed with him were of opinion that the provisions of the clause did nothing more than protect Lady Rothes from injuries which she would not have suffered if the reservoir had not been made. That result, as it appears to me, can only be reached by reading the word "flood," as it occurs in the clause, in a restricted sense. In my opinion, "flood" or "flood of water" from any reservoir, aqueduct, &c., are terms which, according to their primary and natural meaning, include a flood coming from the reservoir, although it had its origin in a stream or streams by which the reservoir is fed, and will therefore, if they are to be taken in that sense, apply to the

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flood of August, 1877, in respect of which the appellant claims compensation. No doubt the words may have a narrower meaning imposed upon them, either by the immediate context, or by its appearing that to give effect to them in their wider sense would lead to results so unreasonable or inconvenient as to be presumably inconsistent with the main objects of the Act. It was argued for the respondents that there are considerations to be found in the present case which tend, on both these grounds, to limit the general meaning of the expression "flood" occurring in sect. 43. First of all it is said that the meaning of the word must be determined by the company in which it is found; and that being associated with bursting or escape of water from a reservoir, aqueduct or pipe, it must be taken to signify a flood ejusdem generis with that occasioned by the bursting of a reservoir, or the escape from a reservoir of water which ought to have been retained in it. To that reasoning I cannot assent. The clause in question, so far as regards the causes of damage which the respondents are to make good, is framed on the principle of enumeration, the three causes enumerated being, "bursting of water," "flood of water," and "escape of water." It is only by so reading the enumeration that the grammatical connection of the sentence can be preserved. Now, what I understand to be the object of enumeration is, to set forth in detail things which are in themselves so distinct, that they cannot conveniently be comprehended under one or more general terms; and there is, in my opinion, no à priori presumption that the things enumerated are all of them of the same kind. When a specific enumeration concludes with a general term, that term is, by a well-known canon of construction, held to be limited to alia similia. The respondents' argument would have been of great force, if the enumeration had been of bursting of water, escape of water, or "other floods" from the reservoir; but as it stands the word "flood" is an independent member of the enumeration, and I can find nothing in the language of the section which fairly leads to the implication that the ordinary meaning of the word is to be limited by reference to the expressions "bursting" and "escape of water."

Again, it is said that by their Act the respondents are not only bound to give a constant supply of compensation water,

which implies the necessity of storage, but are also bound to construct and maintain a waste weir, and to allow all surplus water to escape by it into the Lothrie Burn; and, moreover, that very large powers are conferred upon the proprietors of the Leslie estate with the view of enabling them to enforce these obligations. These statutory provisions, it is argued, are inconsistent with the idea that the legislature intended the respondents to exercise any control over floods arising in the Lothrie Burn and its affluents, above the Ballo reservoir. To my mind that is not a self-evident proposition. A waste weir is necessary in order to relieve the embankments of the reservoir from a pressure of water which they were not constructed to bear, and to guard against the serious consequences which might result from their giving way under that pressure. But, notwithstanding the existence of the waste weir, or byewash, the respondents have unquestionably the means at their command of very largely regulating and controlling the flow of water in the channel of the burn below the reservoir; and, for aught that appears to the contrary in this case, they may be able practically to prevent flooding, unless on the occasion of rainfall so exceptional as to amount almost if not altogether to a damnum fatale. I am unable, therefore, to assume that the legislature in giving the respondents such powers of regulation and control, cannot have intended to make them liable for all kinds of flood coming from the reservoir, though such is the natural import of the language employed, simply because the legislature has also taken precautions to secure the stability of the respondents' works.

Last of all, it is contended by the respondents that to give the word "flood" its ordinary meaning would lead to results so unreasonable, that the legislature cannot be supposed to have used it in that general sense. The argument might be of some weight, if your Lordships were in a position to hold that it has a foundation in fact. But such statutory provisions as those of sect. 43, occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the legislature; and, viewing them as a contract, I am quite unable to say that the advantages which the appellants obtain under sect. 43, according to their construc-

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tion of it, as well as under the other clauses of the Act, constitute an excessive and unreasonable consideration for the benefits which the commissioners have derived from their being able to acquire by compulsion the appellants' right and interest in the water now taken from the Drumain reservoir to Kirkcaldy, and for the interference with the natural flow of the Lothrie Burn occasioned by the use made of the Ballo reservoir.

The language of sect. 49, which provides for the assessment of the damages for which the respondents are by sect. 43 made liable, appears to me to favour the construction for which the appellants contend. In sect. 49, these damages are described as "damages through flood or escape of water, or flooding or bursting of any of the reservoirs authorized by this Act, or works connected therewith." I do not think the "flooding of a reservoir" can arise from causes ejusdem generis with the bursting of a reservoir, or the escape of water which ought to be detained in the reservoir. The effect of these causes is to drain or empty the reservoir; whereas the "flooding of a reservoir" must be due to some cause which fills it beyond its capacity, so that it overflows.

I am, therefore, of opinion that the interlocutors appealed from ought to be reversed, and the cause remitted to the Court below with a declaration that the appellants are entitled, by virtue of the provisions of "The Kirkcaldy and Dysart Waterworks Act, 1867," to compensation for any damage occasioned to the property of the appellant, the Countess of Rothes, by reason of the flood in question from the Ballo reservoir. I am also of opinion that the appellants ought to have their expenses of process in the Court of Session from and after the date of the interlocutor of the Lord Ordinary appealed against, as well as the costs of this appeal, and I move accordingly.

LORD FITZGERALD:—

My Lords, the argument on this appeal finally eventuated in a single question, viz., what was the true construction of the 43rd section of the special Act in reference to the extent of the liability of the defenders. For the pursuer it was contended that on the true interpretation of that section the defenders were bound to

indemnify her from damages caused by a flood of water coming from the reservoir, however that flood of water may have been occasioned. The defenders on the other hand insisted that there having been no failure or insufficiency in their works, and no negligence or default on their part, they were not responsible for damages occasioned by a flood of water wholly attributable to natural causes, unless that flood had been in some way augmented by the reservoir. The Lord Ordinary was of that opinion, and the question is whether he was correct in his view of the 43rd section. If he was not, his interlocutor of the 3rd of December, 1878, cannot be maintained.

We have now, therefore, to interpret the 43rd section of this Act. There can be little difficulty in the plain, literal, and grammatical construction of the section, and I would read it thus, that the defenders "shall be bound" to indemnify the pursuer, Lady Rothes, from all damages occasioned by reason or in consequence of any bursting of any reservoir, aqueduct, pipe, or other works connected therewith, or by reason of or in consequence of any flood or escape of water from any reservoir, &c. The language is clear and simple; and if, on looking at the whole scope and subject of the enactment, we find nothing to indicate a contrary intention, we are coerced to come to the conclusion that the pursuer's contention was well founded.

The terms of sect. 49 seem to me rather to support that view of the statute. The compensation for damages through flood or escape of water in sect. 49 obviously refers to the claims which may arise under sect. 43; and its language may be used to throw light on or to interpret sect. 43. The collocation of the words in sect. 49 is different, and its import is that the pursuer would be entitled to compensation for injury through any flood or any escape of water from, or any flooding of, any of the reservoirs.

It was alleged for the defenders that such a construction would be unreasonable, and that it ought to be limited to those cases of flood water in which the reservoir or works by their existence there increased or aggravated the flood; but it seems to me that to arrive at that conclusion we must interpolate words in sect. 43 which are not to be found in that section.

It was urged also that we should apply the rule "ejusdem

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generis," or "noscitur a sociis"; but that maxim is properly resorted to where otherwise there might be some opening for ambiguity. It would not, as it seems to me, aid us on the present occasion. If the language of that section is not clear, then the rule of interpretation "contra proferentem" seems to me to be specially applicable. The language of the section must be taken as that of the promoters of the Act. They ask the legislature to grant them large powers and privileges, and they propose to give in return to the individuals who may be affected certain rights and protection. They should have taken care to define with accuracy the limits of their liability, so that the parties whose rights they interfere with should not be misled. We are bound to put a construction on the section as favourable to the pursuer as the words of the section will fairly and reasonably bear; for the words are not hers but the promoters'.

It is obvious from the judgments in the Court below that the majority of the judges were influenced by the supposed unreasonableness of the pursuer's contention. Thus Lord Ormidale describes the "result" as one "so unreasonable and extravagant as not for a moment to be entertained." Lord Gifford describes it as "both unreasonable and unjust," and, again, that "it would be against all equity," so that "it could not have been the intention of the legislature to make the defenders liable for an injury with which they had nothing whatever to do." If the result would be unjust, unreasonable, and inequitable, then we ought not to adopt the interpretation unless the language of the promoters is so clear as to be coercive. I propose to apply the test of unreasonableness, having regard to the surrounding circumstances at the time of the passing of the Act, to be collected from the Act itself. I do not propose for a moment to refer to the evidence; but I will take the surrounding circumstances as they appear from the Act itself, and from the plans, sections, levels, and elevations there referred to.

Now, first, this is "an Act for the better supplying with water the parliamentary burghs of Kirkcaldy and Dysart, and suburbs and places adjacent, and for other purposes;" and it is not confined to providing water for the population merely, but it is also for trade and manufactures. In order to carry out those objects

the commissioners are first incorporated. Then, under sect. 35, we have an insight into the plans, levels, and elevations of the works to be constructed; and under sect. 36 the description of the works themselves leaves no doubt as to what is to be done. By sect. 38 the incorporated commissioners receive power from Parliament "to take, collect, and divert" the waters of the burn into their reservoirs, and there "to impound and store up the waters of the burn with its tributaries and affluents, and by means of their works to convey, appropriate, and use the said waters for the purposes of this Act." Their powers, therefore, are very extensive.

My Lords, those powers had in some respects to be guarded against. For instance, I presume from the insight given us by the plans here that the Lothrie Burn was an ordinary mountain stream subject to sudden and considerable floodings, quickly passing away. But I presume that it had also the ordinary characteristics of such a stream; that it had the means of relieving itself from the pressure of flood waters, either by lateral cuts or by the natural elevation of the banks enabling it, when the upper waters of the burn became flooded, to give itself a lateral discharge. But under the powers of this Act the character of that stream is to be totally altered; it is to be converted in fact into a canal, in which all the upper waters are to be collected, none are to be wasted or lost, but all are to be stored up in the Ballo reservoir. If the incorporated commissioners duly carried out their powers and works they would require every drop of that water, in the first instance, for compensation purposes, and afterwards for the larger purposes of the Act of Parliament; and I assume that they took proper means to secure every drop of water coming into the upper channel of this small river, so that none should be lost but that all should be retained in the reservoir. It may be said in fact that the character of the upper river was entirely changed—it ceased to exist as a mere mountain stream, and it became a river entirely in the hands of the commissioners, who by virtue of their works were enabled to collect and store up the entire water coming into the upper burn.

My Lords, when we look again below, the consequences are still more formidable; because you will find as part of the works

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to be established, and for the protection of the embankment, that there was to be a bywash or waste weir. That waste weir was to be at least fifty feet wide, and at an elevation of sixty feet above the channel, the bywash discharging through it, in flood times especially, a considerable amount of water. At a little more than 100 yards below it meets the ordinary channel of the Lothrie Burn. But it is obvious from the description of the stream, and contrasting it with the discharging power of the bywash, that the lower stream in its natural state would be quite insufficient for the discharge of the waters which would be brought down by this large and formidable aqueduct. The natural result from that (and I may call in aid a very large experience in arterial drainage cases) would be that the lower channel in its natural state being unequal to the discharge of the upper waters which are suddenly thrown upon it, the waters are piled up and are forced to discharge themselves, causing ruin on either side. Such would probably be the anticipated result of the works to be formed by the commissioners.

My Lords, under such circumstances, trying the question by the test whether it is reasonable or not, I should say that in the presence of such a probable state of facts indicated by the surrounding circumstances and by the terms of the Act, in the presence of a danger so formidable, it was not unjust or unreasonable for the pursuer to stipulate for a full and complete indemnity. She was to be deprived of all control and of all means of self-protection, and might reasonably insist that the promoters should accept the whole responsibility and indemnify her from damage by flood waters from the reservoir, no matter how caused.

The promoters in reply presented the 43rd section—that is the indemnity which they offered. It has been sanctioned by Parliament, and I see nothing inequitable in it or in its interpretation. My Lords, such was practically the view of my noble and learned friend the Lord Justice Clerk in the Inner House, and I entirely concur in his view.

Interlocutors appealed from reversed, and cause remitted with a declaration that the appellants are entitled, by virtue of the provisions of the Kirk-

caldy and Dysart Waterworks Act, 1867, *to compensation for any damage occasioned to the property of the appellant, the Countess of Rothes, by reason of the flood in question from the Ballo reservoir:—Respondents to pay to appellants their expenses of process in the Court of Session from and after the date of the interlocutor of the Lord Ordinary appealed against, as well as the costs of the appeal to this House:—Respondents also to repay to appellants any sum of expenses paid by them to respondents under the interlocutors appealed from.*

Lords' Journals, July 26, 1882.

Agents for appellants: *Martin & Leslie.*
Agent for respondents: *William Robertson.*

[HOUSE OF LORDS.]

GORDON . . . . . APPELLANT;
GORDON OR CATHCART AND OTHERS . . RESPONDENTS.

Entail—Trust to make strict Entail—Destination to Heirs whatsoever—Construction of.

A. in his final general settlement dated 1853, revoking all prior deeds so far as inconsistent therewith, conveyed his whole estates to trustees with directions to execute a deed of strict entail of his lands "to and in favour of B. and his heirs whatsoever, whom failing to and in favour of C. and his heirs whatsoever," whom failing to persons thereafter to be nominated by him (the truster), always excluding heirs portioners, and failing such nomination, then to "my own heirs whatsoever and their assignees;" but declaring that any member of a family in possession of the entailed estate of M. should be excluded; and also the descendants of the body of his sister Charlotte. B. and C. were A.'s natural sons. C. predeceased A., unmarried. A. died without executing any deed of nomination of fresh heirs. His trustees executed, in 1859, a deed in the form of an entail conveying the estates to B., exactly in terms of the destination in A.'s deed, leaving out C. B. treated the estates as fee simple, and left them in certain directions on his death without issue.

Thereupon the heir-at-law of A. (his brother's son) raised an action against

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A.'s trustees and others concluding for reduction of the deed of 1859, and all subsequent writs, on the ground, inter alia, that the directions as to entailing the estates contained in his uncle's settlements had not been carried out by the trustees in respect that the said deed was not a valid entail under the Act of 1685; and for a declaration that the trustees are bound to execute a new deed of entail in favour of himself as institute and of several other descendants of A.'s brother and sisters as substitute heirs of entail; or alternatively, assuming the deed of 1859 was executed in terms of the truster's intentions, to have it found that it was an effectual entail, and that he was entitled to succeed as heir of entail next in succession to B. He relied on the various prior deeds and settlements, which he contended should be read along with the deed of 1853, which if done, made it clear that A.'s intention was to limit the class of heirs whatsoever of B. to heirs of the body, and also by the term "my own heirs whatsoever," he intended to designate his nearest heir of line and the heirs of the body of such heir, whom failing his own heirs whatsoever:—

Held, affirming the decision of the Court below, that the deed of entail of 1859 had been executed in conformity with the terms of A.'s final trust, the terms of which were clear and unambiguous. That the pursuer had failed to establish that he either possessed or was entitled to claim the character of an heir of provision and tailzie under the entail directed by the trust deed of 1853; that the only ulterior destination being to the truster's own "heirs whatsoever and assignees" the entail came to an end in the person of B., and he could dispose of the estates as he pleased. That it was competent to read all the prior deeds to see how far any of them were to receive effect, along with his final trust settlement—but not competent to use them to put a construction on words bearing a clear and well understood technical meaning and which they do not bear if the deed be construed by itself.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. The late Colonel Gordon of Cluny was the eldest son of Charles Gordon, W.S., Clerk of Session. On his father's death in 1814, Colonel Gordon succeeded to the estates of Cluny and Slains in Aberdeenshire, Buckie in Banffshire, Kinsteary in Nairnshire, and Braid, Craighouse, and Catpair in Midlothian, and to the family residence, No. 4, St. Andrew's Square, Edinburgh. None of these estates were entailed, although some of them were held under titles containing a special destination. Besides these estates Colonel Gordon acquired by purchase during his life the estates of Barra, South Uist, and Benbecula in Inverness-shire, in and subsequent to 1839 at the price of over £170,000; Niedmar in Aberdeenshire in 1843, at the price of £62,000; and Kebbaty, also in Aberdeen, in 1858, at the price of £47,000.

Colonel Gordon was never married, but had illegitimate

children: two sons, John and Charles Gordon, and two daughters. He had one brother Alexander Gordon (the appellant's father) and three sisters: (1) Johanna Gordon or Dalrymple, afterwards Countess of Stair, who died without issue in 1847; (2) Mary Gordon, who died unmarried in 1846; and (3) Charlotte Gordon, who was married first to Sir John Lowther Johnstone of Westerhall, and secondly to Mr. Weyland of Woodeaston; she died in 1845 leaving a numerous family.

Colonel Gordon died on the 16th of July, 1858, his nearest heir-at-law being the appellant, Major-General Charles H. Gordon, eldest son of Alexander Gordon.

During his life Colonel Gordon executed several dispositions and settlements. By deed of provision and settlement, dated the 28th of December, 1833, on the narrative that he was resolved for the better preservation of his estates, family and name to execute in the firmest manner an entail of his lands and estates therein mentioned he disponed

"to and in favour of myself and the eldest son or heir male procreated or to be procreated of my body, and the heirs male of his body successively in order according to their seniorities; whom failing, to the heirs female of the body of my said eldest son, the eldest heir female always succeeding without division, and excluding heirs portioners; whom failing, to the second son procreated or to be procreated of my body, and the heirs male of his body successively in order according to their seniorities."

And so on to his other descendants.

"Whom all failing, to any person or persons to be named by me in any nomination or other writing to be executed by me at any time of my life; and failing of such nomination, or of the person or persons to be therein named, or of the heirs of their bodies to be therein called to the succession, then to Alexander Gordon, my brother, and the heirs whatsoever of his body; whom failing, to and in favour of Mrs. Johanna Gordon or Dalrymple, my eldest sister, and the heirs whatsoever of her body; whom failing, to and in favour of Mary Gordon, my second sister, and the heirs whatsoever of her body; whom failing, to and in favour of Charlotte Gordon or Johnstone or Weyland, my third sister, and the heirs whatsoever of her body; whom all failing, then my said lands and estates shall fall and devolve and belong to my own nearest heirs whatsoever and their assignees, the eldest heir female and the descendants of her body, always excluding heirs portioners, and succeeding without division throughout the whole foresaid course of succession, as well of heirs whatsoever as of heirs of taillie; and in order to leave no room for doubt regarding my intentions as to my own family and their issue by this destination, it is hereby declared that my will is that the issue, both males and females, and whole descendants of my eldest son, shall

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succeed before my second son, and so on through the succession of my sons, and in the same way the whole issue, both males and females, of my eldest daughter shall succeed in preference to my second daughter, and so on through the whole course of succession of my daughters, the eldest female called to the succession always succeeding without division, and excluding heirs portioners, so that while there are heirs, either male or female, of my own body, or descendants, male or female, from them, the heir of tailzie under this present deed shall always be my heir-at-law, unless in the case of two or more females, where the eldest female shall succeed without division, heirs portioners being expressly excluded; and by the term heirs whatsoever of the bodies of my said brothers and sisters is meant and shall be understood the heirs, both male and female, of their bodies successively, according to their seniorities, the eldest heir female always succeeding without division, and excluding heirs portioners, All and whole lands, baronies, mills, teinds, fishings, patronages, and other heritages after specified, lying and described in manner after mentioned" (Cluny, Tillycairn, Shiels, Slains, Kinsteary, Braid, &c.).

Then followed a clause reserving power to alter or revoke this deed at any time of the maker's life. It was never feudalized, and was found in Colonel Gordon's repositories after his death.

On the 15th of October, 1835, he executed another deed, which, proceeding on the narrative of the deed of entail of the 28th of December, 1833, and of his reserved power therein to execute a nomination of heirs to succeed after his own descendants, continued:

"And seeing that it is not at present my intention to marry, so as to have lawful heirs of my own body to succeed to me under said deed of entail, and that, in performance of a promise made to my dearest departed and ever-to-be-lamented daughter, I am desirous to call to the succession of said entailed estates, after my death, my two natural sons, Charles Gordon and John Gordon, at present residing in family with me at Cluny Castle; and that I am also desirous, in so far, to alter said deed of entail as to withdraw from its operation the estate of Catpair and my heritable properties situated in the county of Edinburgh, as after mentioned: Therefore, in virtue of the powers reserved to me by said deed of entail, I do hereby nominate and appoint my son, the said Charles Gordon, and his heirs whatsoever, on his attaining the age of twenty-five years complete, but not sooner, to succeed to me under said deed of entail in the whole lands and estates therein enumerated, with the special exceptions hereinafter mentioned (the entailed estates being until that period conveyed by me to trustees for certain purposes under the general deed of settlement after mentioned, executed by me of this date); and failing my said son Charles and his heirs whatsoever, I hereby nominate and appoint my said son John Gordon and his heirs whatsoever to succeed to said entailed estates, whom all failing, then the succession to open and descend to the series of heirs of entail or substitutes specially enumerated in my said deed of entail. And specially providing and declaring, that in the event of the succession opening to females, the eldest heir

female and her heirs whatsoever shall always succeed, without division, to the exclusion of heirs portioners; and failing the eldest heir female and her heirs whatsoever, the next eldest heir female and her heirs whatsoever shall in like manner succeed without division, and excluding heirs portioners; and so on through the whole course of female succession. And to remove all doubt or ambiguity regarding my intentions, by this present deed I do hereby declare my wish and desire to be that my son, the said Charles Gordon, shall, on attaining the age of twenty-five, succeed to me and inherit my whole lands and estates specified and contained in said deed of entail, under the clauses and conditions therein specially enumerated (with the exception always of the lands, estates and others which are withdrawn from the entail as after mentioned), and that, after his death, his lawful heirs, both male and female, shall succeed to him as heirs of entail according to the ordinary course of law, excepting only in the case of heirs female, that the eldest for the time shall always succeed, without division, to the exclusion of heirs portioners: And that failing my said son Charles Gordon and his heirs whatsoever, my son the said John Gordon and his heirs whatsoever shall in like manner succeed under said deed of entail to the lands and estates therein contained, under the exceptions before referred to; and until the succession opens to my said son Charles Gordon, the said entailed estates and whole rents thereof are to fall under the dispositive clause of the general deed of settlement after mentioned, executed by me of this date: And it is my distinct wish and intention that neither my brother, nor any of the other heirs of entail or substitutes called to the succession by said deed of entail, shall have any right or title to succeed under the same so long as my said sons, Charles Gordon and John Gordon, or their issue, either male or female, are alive."

Of the same date Colonel Gordon executed a deed conveying his whole heritable and moveable estates to trustees, with directions to pay his debts, and certain annuities to his two sons until they attained the age of twenty-five. When Charles reached that age the trustees were to convey to him the estates on the north of the Dee, under the deed of entail and deed of nomination. And on John attaining twenty-five they were "to convey to him and to his heirs in fee simple the house in St. Andrew's Square, Edinburgh; and also to settle and secure in the terms of a strict entail my estates of Braid and Craighouse, in the county of Edinburgh, and any other estates that I may acquire south of the river Dee, upon him the said John Gordon and his heirs whatsoever, whom failing upon my son the said Charles Gordon and his heirs whatsoever."

"The succession in the case of heirs female being always limited, as in my said deed of entail, to his eldest heir female without division, whom all failing upon the other heirs of entail or substitutes mentioned in my said deed of entail, upon

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the model of which deed of entail my said trustees shall cause the deed of entail of my estates in Edinburghshire to be formed."

Thirdly, the trustees were directed to lay out and invest the whole accumulations of rent, &c., of the heritable estate, together with the whole produce of his personal estate, in the purchase of lands situated as near as they can be reasonably had to the Cluny estate, and the other estates north of the Dee, and the lands so bought were to be secured by deed of strict entail upon the same series of heirs, and under the same conditions, &c., as were contained in the Cluny entail and in the deed of nomination. The settlement then contained the following clause:

"And I hereby revoke and recall all deeds of settlement heretofore executed by me, in so far as the same may be inconsistent with these presents, without prejudice, however, to my said deed of entail, which shall stand and remain in full force and effect, in so far as not altered, to my said son Charles Gordon, and the other heirs of entail, upon the lapse of the period fixed by me for his succession thereto; the rents in the meantime being payable to my said trustees in virtue of, and for the purposes specified in, this present deed; but should it happen from any cause that said deed of entail should be reduced or found inoperative, then my said trustees shall be entitled, and they are thereby authorized and required, to claim the whole of my said entailed estates in virtue of these presents, and to make up titles thereto and to re-settle and of new entail the same, according to my intentions as expressed in my said deed of entail, and in the relative deed executed by me, of this date, for calling my said sons, Charles Gordon and John Gordon, to the succession, or as nearly consistent therewith as may be found advisable to give effect to the deed."

On the 24th of April, 1837, Colonel Gordon executed a last will, with codicil attached, dated the 21st of June, 1852, directing his trustees to sell his English and West India estates after his death, and hold the moneys so obtained to and for the several ends specified in the deed of settlement of 1835.

On the 4th of January, 1847, Colonel Gordon executed a supplementary deed of settlement, which was necessitated by the purchase of the Long Island estates in Inverness-shire, and Midmar in Aberdeenshire. He directed that the former should be included, along with the estates south of the River Dee, in the entail to be executed in favour of John Gordon and his heirs whatsoever; whom failing, Charles Gordon and his heirs whatsoever; whom failing, the institute and substitutes mentioned in the deed of 1833; and that the latter should be included along with any estate which he might

purchase on the north of the River Dee in an entail to be executed in favour of Charles Gordon and his heirs whatsoever &c. He made some slight alterations upon the settlement of 1835, but otherwise confirmed it, and the deed of nomination and entail.

The next deed was dated the 21st of February, 1852, by which Colonel Gordon disponed to himself in liferent and to his eldest son John Gordon, and his heirs and assignees, in fee, the lands of Midmar. This was done with the object of affording his son the statutory qualification for becoming a deputy lieutenant for the county of Aberdeen, and a captain of Aberdeenshire Militia.

Three days later the next deed was executed, 24th of February, 1852, which was a bond and obligation by the son John Gordon, which narrating that the foresaid disposition was granted for the purposes named, he acknowledged and declared that notwithstanding the disposition, Colonel Gordon was to have full power and to be at liberty, if so inclined, to execute a deed of strict entail of the said lands of Midmar, on the model of the said deed of entail of Cluny and others; and he bound himself to concur in such deed of entail, and become a party consenter thereto, and hold the estate under such entail exclusively.

The next deed is a general disposition and deed of settlement dated the 21st of June, 1852, recorded as a probative writ, proceeding on a narrative of all the prior deeds.

And then as to the deed dated the 21st of February, 1852, conveying Midmar to himself in liferent and John Gordon in fee, this deed bore

"That upon the 21st day of February, 1852, I granted a disposition of my estate of Midmar in favour of myself in liferent, and of my said eldest son, John Gordon, and his heirs and assignees, in fee, for the purpose of qualifying him, in terms of the Act of Parliament, as a deputy-lieutenant in the county of Aberdeen, and a captain in Her Majesty's regiment of Aberdeenshire Militia, but he has, by bond and obligation, of date the 24th day of February, 1852, agreed to hold the said estate under the title of a strict entail, as I may direct, and to renounce and discharge upon his succession under such entail, his infeftment under such said disposition, and to hold and enjoy the estate under such entail exclusively;"

the deed then continued:

"and now, seeing that from the death of two of the trustees in my original deed of settlement, and a variety of circumstances which have since occurred, I have resolved to make certain alterations upon my deeds of settlement, and to appoint new trustees and executors to carry my wishes into effect, and having full confi-

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dence in the integrity and ability of the parties after named for that purpose, therefore I do hereby give, grant, assign, and dispone to and in favour of James Brands Allan, Esq., M.D. of the University of Edinburgh, lately residing at Cluny Castle; James Malcolmson, Esq., of King William Street, London, and West Lodge, Campden Hill, Kensington; and William Fullerton Cumming, Esq., M.D. of the University of Edinburgh, formerly of the East India Company's Service; my said eldest son, now Captain John Gordon, of the Aberdeenshire Militia; and Mr. William Robison, advocate in Aberdeen, or the acceptors or acceptor, survivors or survivor of them, as trustees, for the ends, uses, and purposes after specified, and to their assignees, my whole estates heritable and moveable wheresoever situated."

"And with power to my said trustees either to complete titles to my heritable estates by adjudication in implement, or, in their opinion, to save time and expense, to require my heir-at-law for the time being (if major), to allow a feudal title to my said heritable estates to be made up and completed in his person, and to grant the necessary procuratory or warrant for completing the service; and thereupon, unico contextu, and by the same deed, to denude and convey the whole of the said heritable estates in favour of my said trustee, under the penalty of forfeiting all right and interest under my said deed of entail, or the other deeds of entail hereby appointed to be executed."

The most important subsequent clauses were identical with those in the final deed of 1853 after mentioned, and this deed also contained a revocation of all the previous deeds of settlement so far as inconsistent therewith.

Also on the 21st of June, 1852, Colonel Gordon executed a bond of provision in favour of his two sons and his daughter Susan. It narrated all the previous deeds and bore to be granted

"To prevent the possibility of my views for my children's welfare being defeated by the said deeds, or any of them being from any causes rendered inoperative or ineffectual to the prejudice of my said children."

"Therefore I hereby bind and oblige myself, my heirs, executors, and successors whomsoever, at the first term of Whitsunday or Martinmas that shall happen after my decease, to make payment to my said sons and daughter of the sums of money after specified, but subject always to the conditions and restrictions hereinafter mentioned, viz.:—to my said eldest son, John Gordon (now Captain John Gordon, of H.M. regiment of Aberdeenshire Militia), of the sum of £750,000 sterling; to my said youngest son, Charles Gordon, of the sum of £250,000 sterling; and to my said daughter, Susan Gordon, of the sum of £10,000 sterling, with interest of the said respective sums from and after the said term of payment till paid: But declaring that the said sums of money provided to my said sons shall only be payable with the consent and concurrence of the trustees and executors nominated and appointed by me in my said deeds or settlement, or to be named and appointed by me in any after deed of settlement to be executed by me, and that the said sums of money shall be laid out and

applied by my said trustees, acting for the time with the concurrence of my said sons, in the purchase of landed estates, to be settled and secured under strict entails on my said sons respectively, according to the amount of their respective provisions; declaring that the estates to be purchased with the provision of my eldest son, Captain John Gordon, shall be settled or secured by a deed or deeds of strict entail in terms of the Act of the Scottish Parliament passed in 1685, to and in favour of my said eldest son, Captain John Gordon, and the heirs whatsoever of his body; whom failing, to my youngest son, Charles Gordon, and the heirs whatsoever of his body; whom failing, to any persons to be named in any deed of nomination to be afterwards executed by me at any time during my life, the eldest heir-female and the descendants of her body, excluding heirs portioners, and always succeeding without division, and failing of such nomination, or of the persons so to be named and their heirs, then to my own heirs whomsoever and their assignees: But declaring that my third sister, Charlotte Gordon, or Johnstone, or Weyland, and the descendants of her body, shall be excluded and debarred from the succession to the said estates."

Then followed a similar direction to entail the lands to be purchased with the provision granted to Charles, the only difference being that the words "of his body" were omitted, the words used being—

"Upon the said Charles Gordon, my youngest son, and his heirs whatsoever; whom failing, upon my eldest son, the said Captain John Gordon, and his heirs whatsoever."

The bond concluded with a declaration—

"That this present bond of provision shall only be binding and effectual in case my said sons and daughter shall from any cause be prevented or debarred from succeeding under the said deed of entail, deeds of settlement, and the other deeds of provision already executed, or to be hereafter executed by me, according to my declared wishes and intentions as expressed in these deeds: and in the event of their succeeding under such deeds, then this present bond of provision shall become void and null."

On the 28th of May, 1853, Colonel Gordon executed his final disposition and settlement. It proceeded on the narrative of all the previous deeds, and narrated also the bond and obligation of John Gordon to succeed to the estate of Midmar under the title of a strict entail as he, the truster, might direct. And then it specially narrated that the disposition and settlement of the 21st of June, 1852, contained a power to call upon the truster's heir-at-law to allow feudal titles to be completed in his person, and continued:—

"And now, seeing that the titles to my present heritable estates in Scotland are understood to be complete, and the estates feudally vested in my person, so that

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I am in a position to grant a special conveyance to the whole Scotch heritable estates at present belonging to me, and thereby enable my said trustees, under my own authority, to complete their titles, after my death, to these estates, without the necessity of having recourse either to the Court of Session, or to my heir-at-law, for that purpose; and that it is my wish and desire that my said trustees should be saved the delay, expense, and inconvenience which might occur from any such reference to the Supreme Court, or my heir-at-law, so far at least as regards the real estates after disponed, standing already duly vested in my person: Therefore I do hereby give, grant, assign, and dispone to and in favour of the said James Brands Allan, and others, and the acceptors or acceptor, survivors or survivor of them, and to such persons as may be assumed by them, in virtue of the powers after mentioned, as trustees for the ends, uses, and purposes after specified, and to their assignees, the lands, baronies, estates, and others hereinafter specially described, as well as the heritable and moveable, real and personal estates generally hereinafter conveyed."

[Then followed a particular description of the properties, including the moveable estate.]

The third purpose of this deed was as follows, being exactly similar to that in the deed of 1852, except that in this deed the whole heirs of entail were bound to take the surname of Gordon and bear the arms of Cluny:

"Tertio, After the said trustees shall have completed a title in their persons to the whole lands and estates belonging to me in Scotland, I hereby direct and appoint them to execute a deed or deeds of strict entail, in terms of the Act of Parliament of Scotland, passed in the year 1685, intituled "Act concerning Tailzies," of the whole lands and estates situated in Scotland, now belonging or which shall belong to me at the time of my death (with the exceptions of the estates of South Uist, Benbecula, and Barra, and other lands now belonging to me, in the county of Inverness, hereafter specially destined), and that to and in favour of my eldest son, the said John Gordon, now Captain John Gordon, and his heirs whatsoever; whom failing, to and in favour of my youngest son, the said Charles Gordon, and his heirs whatsoever; whom failing, to any persons to be named in any deed of nomination to be afterwards executed by me at any time of my life the eldest heir-female, and the descendants of her body, excluding heirs-portioners, and succeeding always, without division, through the whole course of the female succession; and failing such nomination, or of the persons so to be named, and their heirs whatsoever, then to my own heirs whomsoever and their assignees; which entail shall contain an express clause, providing that the whole heirs of entail succeeding under such deed or deeds of entail shall be bound and obliged constantly to bear, use, and retain the surname of "Gordon," and arms and designation of "Gordon of Cluny," in all time after their succession to, or obtaining possession of, my said lands and estates, as their proper surname, arms, and designation; but declaring always, as it is hereby expressly provided and declared, that my third sister, Charlotte Gordon or Johnstone or Weyland, and the heirs whatsoever of her body, shall be expressly excluded from all right of succession to the said estates, in the deed or deeds of entail to be executed by my said trustees: And

further, declaring that no member of the family of "Trotter of Mortonhall;" possessing that estate shall be entitled to succeed to any part of my estates of Braid or Craighouse, in the county of Edinburgh, under the deed or deeds of entail to be executed as aforesaid: And I further appoint my said trustees to execute a deed or deeds of strict entail, in terms of the foresaid Act of Parliament of Scotland, passed in the year 1685, intituled "Act concerning Tailzies," of the estates of South Uist, Benbecula, and Barra, and other lands belonging to me in the county of Inverness, specially above disponed to and in favour of my said youngest son, Charles Gordon, and his heirs whatsoever; whom failing, to my said eldest son, John Gordon, now Captain John Gordon, and his heirs whatsoever; whom failing, to any persons to be named in any deed of nomination to be afterwards executed by me at any time during my life; the eldest heir female, and the descendants of her body, excluding heirs-portioners, and succeeding always without division; and failing of such nomination, or of the persons so to be named and their heirs, then to my own heirs whomsoever and their assignees; but declaring always, that my said sister Charlotte Gordon or Johnstone or Weyland and the descendants of her body, shall be excluded from the succession of the said entailed estates as aforesaid."

The deed then directed the trustees to lay out the whole residue remaining of the rentable and personal estates, in the purchase of land, as near as possible to Cluny and the other estates, and to entail it on the same series of heirs given above, including the exclusion of Colonel Gordon's sister Charlotte and her heirs whatsoever.

The deed then contained this clause of revocation:

"And I hereby revoke and recall all deeds of settlement, and deeds of tailzie or provision, and all other deeds heretofore executed by me, in so far as the same are or may be inconsistent with these presents; but with this express provision or declaration, that if this deed of settlement should be reduced or set aside, or from any cause become inoperative or ineffectual, then the foresaid deeds of settlement, deeds of tailzie or provision, and other deeds executed by me previous to the date of these presents, shall remain valid and effectual, and receive full force and effect in all courts of law or equity, anything herein contained to the contrary notwithstanding—it being my express wish and desire, that if the present deed of settlement is not to be given effect to, my previous deeds for settling and securing the succession to my heritable estates in the persons of my said sons, Captain John Gordon and Charles Gordon, in preference to all other persons, and for making a suitable provision to my said daughter, Susan Gordon, shall continue in full force and effect, so that the succession to my heritable estates may be secured preferably, and in the first place, to my own sons and their heirs whatsoever, before any other person can claim to succeed to me, and that my said daughter may be fully secured in the provisions either now or formerly secured or settled on her; reserving always full power to me, at any time of my life, to alter, innovate or revoke these presents, either in whole or in part, and to sell, burden, and dispose of the whole estates, heritable and moveable, hereby conveyed, or any part thereof,

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either onerously or gratuitously, as I shall think proper; but declaring that this deed, in so far as the same shall not be revoked or altered by a writing under my hand, shall have the effect of a delivered evident, though found in my repositories, or in the custody of any other person, undelivered at the time of my death, the delivery hereof being hereby dispensed with."

This deed was not afterwards altered by Colonel Gordon, except to the effect of recalling a single legacy under it to Charles Gordon, on which occasion he confirmed the rest of the deed.

At the testator's death all the before-mentioned deeds, with the exception of the bond of provision of 1852, which Colonel Gordon had himself recorded, were registered by the trustees.

Charles Gordon died without issue in 1857; and Colonel Gordon died in 1858 without having exercised the reserved power of nominating other heirs.

On the 4th and 9th of April and 7th of May, recorded the 15th of June and 1st of July, 1859, in implement of the testator's directions contained in the third purpose of the deed of 1853, Colonel Gordon's trustees conveyed by disposition in the form of a deed of entail the whole lands and estates in question:—

"To and in favour of the said Captain John Gordon and his heirs whatsoever; the eldest heir female and the descendants of her body, excluding heirs portioners, and succeeding always without division through the whole course of the female succession; whom failing, then to the heirs whomsoever of the said deceased Colonel John Gordon, and their assignees: But expressly excluding always, in terms of said trust deed, Charlotte Gordon or Johnstone or Weyland, third sister of the said deceased Colonel John Gordon, and the heirs whatsoever of her body, from all right of succession to the estates after mentioned, under these presents; and declaring that no member of the family of "Trotter of Mortonhall," possessing that estate, shall be entitled to succeed to any part of the estates of Braid or Craighouse, &c.."

John Gordon, the son, sometimes called Captain Gordon, entered into possession of the estates. Shortly after he raised an action against Colonel Gordon's trustees to have it declared that the entail was invalid or ineffectual. Prior to the raising of that action he wrote on the 5th of December, 1860, to the present appellant stating that having been advised by his law agents that the Cluny entail was not effectual, he intended to act on the advice given him in consequence of the harassing restrictions under which the entail placed him, checking his designs for the improvement of the estates, and depriving him of that feeling of independence

which he knew to have been the great object of his father to secure. His desire was to carry out to the best of his ability his father's designs, and "to preserve the same series of heirs." That the question would be raised by action of declarator, and he (the pursuer) would be called as defender. That he hoped he understood that these proceedings were not to disturb their present relations, and that he would aid him in obtaining a friendly settlement of the question. Acting on the advice he had received, John Gordon raised an action of declarator, the 27th of May, 1861, against the present pursuer and the other heirs-at-law of Colonel Gordon to have it found and declared that the disposition and deed of entail of 1859, was invalid, and that he, John Gordon, was entitled to hold the lands and estates in fee simple; arguing that under the Act of 1685, it was incompetent to make a valid entail on the "heirs whatsoever" of the institute, and therefore, the deed containing no proper tailzied destination, he held the estates in fee simple. The trustees of Colonel Gordon, and the pursuer lodged defences. The latter being called as heir whomsoever and declining to contend as an heir of entail, the Court held that he was not a proper contradictor, and that no effectual decision could be pronounced; they therefore recalled the Lord Ordinary's interlocutor of date the 12th of December, 1861, and dismissed the action on the 1st of March, 1862 (1).

A second action, *Macgregor* v. *Gordon* (2), was a note of suspension raised by Donald Macgregor on John Gordon demanding implement and threatening a charge for the price of part of the before mentioned estates, which he had sold to Macgregor.

In that case Macgregor pleaded that John Gordon had no right to sell: because the estates were entailed,—the destination to John Gordon and his "heirs whatsoever," meaning to John Gordon and the heirs of his body—he being illegitimate. The Court held in conformity with the opinion of twelve out of thirteen judges that John Gordon was fee simple proprietor.

To this action the pursuer was not a party.

In a third action, *Gordon* v. *Gordon's Trustees* (3), Captain

(1) 24 Court Sess. Cas. 2nd Series, 687.

(2) 3 Court Sess. Cas. 3rd Series, 148.

(3) 4 Court Sess. Cas. 3rd Series, 501.

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John Gordon was the pursuer, and the question there raised was whether the trustees were bound to purchase lands with the testator's personal estate, or whether Captain John Gordon was entitled to have the money paid over to him. By a majority of nine judges to four the judgment was in Captain John Gordon's favour.

In 1865 John Gordon married Mrs. Emily Eliza Steels Pringle or Gordon, now Lady Gordon Cathcart. He died the 31st of March, 1878, leaving a trust disposition and deed of settlement dated the 4th of January, 1869, and various codicils. By this trust disposition he conveyed to trustees the estates of Cluny and the whole lands vested in him by the deed of entail of 1859. The main purposes of this deed, in the event which has happened of John Gordon dying without heirs of his body, or heirs whatsoever, were for payment to Mrs. Gordon of the whole free revenues of the mainland estates; secondly, after Mrs. Gordon's death, the trustees were to execute a strict entail of the estates of Cluny and others, failing heirs of the testator's body, and failing any nomination by him, to and in favour of Charles Arthur Linzee, and the heirs of his body, whom failing, to others and the heirs of their bodies, whom all failing, then to the heirs whatsoever of his late father, Colonel Gordon of Cluny and their assignees; thirdly, the trustees were directed to convey the estates of Barra, South Uist and Benbecula to Mrs. Gordon, absolutely, with a destination which she could, if she chose, evacuate to the heirs of entail mentioned in the second purpose.

Following on the conveyance contained in this trust disposition, the respondents' John Gordon's trustees were vested in the said lands. And by disposition recorded the 19th of July, 1878, these trustees conveyed to Mrs. Gordon, whom failing, to various heirs of entail designated above, the estates of Barra, South Uist and Benbecula. By a subsequent disposition record the 23rd of July, 1878, the respondent Mrs. Gordon conveyed these estates to herself and her heirs and assignees whomsoever, and so evacuated the destination to other heirs.

On the 3rd of December, 1880, the appellant, the nearest heir-of-line of Colonel Gordon, raised this action to establish his right to Colonel Gordon's estates as heir of tailzies and provision. The

action was directed against (1), the trustees of the late Colonel Gordon, who did not appear; (2), Against the trustees of the late John Gordon; (3), Against Lady Gordon Cathcart, John Gordon's widow, and the series of heirs, on whom John Gordon directed his trustees to entail his mainland estates after his widow's death. The leading conclusions of the summons were for reduction of the deed dated 1859, with all the deeds that had followed thereon, in so far as they related to the Cluny estates, and for declarator, that Colonel Gordon's trustees were bound to execute and deliver to the pursuer, in implement of Colonel Gordon's settlement, and the various deeds of entail, provision or settlement therein referred to, a deed of strict entail in terms of the Act of Parliament of Scotland, passed in 1685, of the whole lands in so far as these were vested in the respondents, the said trustees, under the trust disposition of the said John Gordon, natural son of Colonel Gordon, or in the said Emily Steels Pringle or Gordon, having the following destination:—

"To and in favour of the pursuer, the said Charles Henry Gordon, eldest son of the late Alexander Gordon of Myless, in the county of Essex, immediate younger brother of the said deceased Colonel John Gordon, and the heirs whatsoever of the body of the said Charles Henry Gordon; whom failing, Alexander Stillingfleet Gordon, only child of the deceased Cosmo Spencer Gordon, second son of the said deceased Alexander Gordon of Myless, and the heirs whatsoever of the body of the said Alexander Stillingfleet Gordon; whom failing, George Augustus Gordon, third son of the said deceased Alexander Gordon of Myless, and the heirs whatsoever of the body of the said George Augustus Gordon; whom failing, Eleanor Johanna Gordon, eldest daughter of the said deceased Alexander Gordon of Myless, and the heirs whatsoever of the body of the said Eleanor Johanna Gordon; whom failing, Maria Frederica Gordon or Linzee, wife of Robert George Linzee, Esq., of Jermyns, Romsey, in the county of Hants, second daughter of the said Alexander Gordon of Myless, and the heirs whatsoever of the body of the said Maria Frederica Gordon or Linzee; whom failing, Marion Margaret Gordon, third daughter of the said Alexander Gordon of Myless, and the heirs whatsoever of the body of the said Marion Margaret Gordon; whom failing, to and in favour of the heirs whatsoever of the body of the deceased Mrs. Johanna Gordon or Dalrymple, eldest sister of the said deceased Colonel John Gordon; whom failing, to the heirs whatsoever of the body of Mary Gordon, second sister of the said deceased Colonel John Gordon; whom all failing, to the nearest heirs whatsoever of the said Colonel John Gordon and their assignees, which entail should contain an express clause providing that the whole heirs of entail succeeding under such deed or deeds of entail should be bound and obliged constantly to bear, use, and retain the surname of "Gordon," and the arms and designation of "Gordon of Cluny," in all time after their succession, or obtaining possession of, the said lands and estates,

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as their proper surname, arms, and designation; but under the express provision and declaration that the third sister of the said deceased Colonel John Gordon, Charlotte Gordon or Johnstone or Weyland, and the heirs whatsoever of her body, should be expressly excluded from all right of succession to the said estates in the deed or deeds of entails to be executed by his said trustees; and under the farther declaration that no member of the family of "Trotter of Mortonhall" possessing that estate should be entitled to succeed to any part of the said estates of Braid or Craighouse, in the county of Edinburgh, under the deed or deeds of entail to be executed as aforesaid: Or alternately to the foregoing conclusions of this summons, and in the event of its being found and declared by our said Lords, that the said defenders, James Brands Allan and William Fullerton Cumming, along with the said deceased Captain John Gordon and William Robison, as trustees aforesaid, were bound to execute the said disposition and deed of entail, dated 4th and 9th of April and 7th of May, 1859, in the terms therein contained, then it ought and should be found and declared by our said Lords, that the said deed is a valid and effectual deed of entail in terms of the Act of the Parliament of Scotland, passed in the year 1685, entituled "Act concerning Tailzies," and that the pursuer, as the nearest heir whomsoever, at the date of the death of the said Captain John Gordon on the 31st of March, 1878, or on whatever other date the same happened, is entitled, as heir of entail next in succession to the said Captain John Gordon, to the free use, enjoyment, and possession of the lands, baronies, and others above set forth, and is entitled to make up titles as heir of tailzie and provisions therein in competent form, and therefore, and for other reasons to be proponed at the discussing hereof, the said writs [John Gordon's will, the title made up following thereon by his trustees, the disposition of the lands in Inverness-shire to Lady Gordon Cathcart, and her disposition thereof] ought to be reduced and declared null and void: *Or otherwise*, and in the event of its also being found by our said Lords that the said disposition and deed of entail, dated the 4th and 9th of April and 7th of May, 1859, is invalid and ineffectual as a deed of strict entail, in terms of the said Act 1685, entituled "Act concerning Tailzies," then it ought and should be found and declared by our said Lords that, by his bond and obligation, granted in favour of the said Colonel John Gordon by the said Captain John Gordon on the 24th of February, 1852, the said Captain John Gordon bound and obliged himself, his heirs and successors, to concur in such deed of entail, and to become a party consenter thereto; and, upon being called to the succession under such deed, immediately thereafter to hold and possess the said lands, baronies, and others, above set forth, or at least, the lands and barony of Midmar and others, under and by virtue of such deed alone; and that therefore, by his execution of the said bond and obligation and the said disposition and deed of entail of the 4th and 9th of April and 7th of May, 1859, the said John Gordon, for himself, his heirs and successors, concurred in the said disposition and deed of entail, became, for himself, his heirs and successors, a party consenter thereto, and bound himself and them not to interfere with or alter the destination therein contained."

The appellant's pleas in law were, inter alia:—

"(1.) The pretended deed of entail by Colonel Gordon's trustees does not give full and true effect to his testamentary writings condescended on, but is discon-

form thereto, in respect that—(1.) It is not, as regards the destination therein contained, a valid entail in terms of the Act 1685, c. 22; (2.) It does not contain a valid substitution of the pursuer and the other substitutes of entail appointed in Colonel Gordon's deed of entail of 1833, to John Gordon as institute and the heirs of his body, and it ought therefore to be reduced as concluded for. (2.) The said pretended deed of entail not being in fulfilment of the directions of Colonel Gordon, could not vest in John Gordon a fee-simple title to the lands and others thereby conveyed, and therefore the trust-disposition and settlement of the said John Gordon, and the other writs following thereon, second to seventh inclusive above libelled, so far as affecting the said lands and others, are null and void, and should be reduced as concluded for. (3.) Colonel Gordon's trustees, having failed to exercise a valid entail according to his directions, the surviving trustees are bound to execute a valid deed of entail in terms of the first declaratory conclusion hereof. (9.) On the assumption that the destination in the deed of entail is ineffectual as a tailzied destination, the succession to Colonel Gordon's estates then falls to be regulated by his previous deeds, in virtue of the clause to that effect in his settlement of 1853. (11.) The deed of entail by Colonel Gordon's trustees is a valid and effectual entail within the meaning of the Act 1685, c. 22, and still stands as such in the Register of Entails, and the lands thereby conveyed were held by John Gordon under the fetters of a strict entail. (13.) *Or alternatively*—Separatim, the substitutions in the said deed of entail not having come to an end in the person of John Gordon, his said disposition and settlement is not effectual to alter or evacuate the destination. (14.) The pursuer is, under the said entail, next heir of tailzie and provision in succession to John Gordon, and is entitled to make up titles in that character."

To the action Captain John Gordon's trustees and Mrs. Gordon, now Lady Cathcart, lodged defences which Charles Arthur Linzee adopted and concurred in on behalf of himself.

On the 25th of June, 1881, the Lord Ordinary (1) repelled the reasons of reduction; assoilzied the respondents from the whole conclusions of the action; and decerned. The appellant lodged a reclaiming note against this interlocutor, but the Lords of the Second Division, on the 28th of October, 1881, refused the note and adhered to the Lord Ordinary's interlocutor (2).

The Lord Ordinary was of opinion that he might refer to the earlier deeds before 1853 for the purpose of assisting him to construe the final settlement of that date; and also for the purpose of seeing how far any of them were to stand or receive effect with that settlement. His Lordship thought that the limitations in some of the earlier deeds afforded ground for reading "heirs whatever" as "heirs whatsoever of the body" of John Gordon. He

(1) Lord Curriehill. (2) 9 Court Sess. Cas. 4th Series, 50.

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doubted, therefore, the soundness of the decisions in *Macgregor* v. *Gordon* (1) and *Gordon* v. *Gordon's Trustees* (2). But on the other hand he was of opinion that the previous deeds afforded no ground whatever for construing the direction in the trust deed of 1853 as to the destination failing John Gordon and his heirs, otherwise than in the natural signification of the words employed, viz., in favour of the truster's own heirs whatsoever.

On appeal,

July 21, 22. *The Lord Advocate* (*J. B. Balfour*, Q.C., with him *Benjamin*, Q.C.), was heard for the appellant, his argument sufficiently appears in the opinions of the Lords.

[They cited *Sprot* v. *Sprot* (3); *Forrest's Trustees* v. *Martine* (4); *Graham* v. *Stewart* (5); *Glenorchy* v. *Bosville* (6); *The Roxburghe Case*, *Ker* v. *Innes* (7); *Halliday* v. *Maxwell* (8); *Tinnoch* v. *M'Lewnan* (9); *Stirling* v. *Moray* (10); *Weir* v. *Steill*, 1745 (11); *Primrose* v. *Primrose* (12); Erskine, Instit. 3, 8, 32.] See also Stair, 2. 3. 43. and 4. 18. 8.; Sandford on Entails, pp. 80, 547; Lord Corehouse in the case of *Mure* (13); *Connell* v. *Grierson* (14).

The Solicitor-General for Scotland (*Asher*, Q.C.), and *Davey*, Q.C. appeared for John Gordon's trustees and Lady Gordon Cathcart, but were not called upon.

Sir F. Herschell, S.G., appeared for the respondent Charles Arthur Linzee, but was not called upon.

The House took time for consideration.

July 26. LORD BLACKBURN:—

My Lords, I do not think it necessary to call upon the respon-

(1) 3 Court Sess. Cas. 3rd Series, 148.
(2) 4 Court Sess. Cas. 3rd Series, 501.
(3) 6 Court Sess. Cas. 1st Series, 833.
(4) 8 Court Sess. Cas. 2nd Series, 304.
(5) 15 Court Sess. Cas. 2nd Series, 558; affirmed, 2 Macq. 295.
(6) 1 W. & T. 1.
(7) 5 Pat. App. 320, at p. 441.
(8) 4 Pat. App. 346.
(9) Nov. 26, 1817, 19 Fac. Coll. 392.
(10) 7 Court Sess. Cas. 2nd Series, 641.
(11) Mor. Dict. 11,359.
(12) 16 Court Sess. Cas. 2nd Series, 498.
(13) 15 Court Sess. Cas. 1st Series, at p. 584.
(14) 5 Court Sess. Cas. 3rd Series, 379.

dents' counsel in this case, for I think that one point which is fatal to the appellant's case is perfectly clear.

If it had been necessary to decide whether the trustees of Colonel Gordon have executed a deed which either ought to be construed as entailing the lands on John Gordon and the heirs of his body; in other words, whether your Lordships should review the decision in *Macgregor* v. *Gordon* (1), or whether, if the trustees have not done so, the deed should be reformed so as to produce that effect, I should have wished to hear further argument. On these points I pronounce no opinion, leaving the authority of the case alluded to neither strengthened nor shaken by anything I now say.

But John Gordon never had heirs of his body; and even if the deed were read or reformed as meaning that the entail was on Captain John Gordon and the heirs of his body, "whom failing then to the heirs whomsoever of the said deceased Colonel John Gordon and their assignees," Captain John Gordon was competent to dispose of the estates as he has done.

The pursuer must make out that for these words there ought to have been substituted a clause entailing the lands on him and the heirs of his body, or rather that before these words there should have been inserted a clause to that effect.

The property at stake is very large; but this point on which the whole depends is not, I think (and I believe all your Lordships who heard the case think so) either doubtful or difficult.

Colonel John Gordon commences his general settlement by a narrative that he had previously executed eight different deeds, and, after disposing of everything to his trustees on the trusts after-mentioned, he inserts a revocation in these terms: "And I hereby revoke and recall all deeds of settlement, and deeds of tailzie or provision, and all other deeds heretofore executed by me, in so far as the same are or may be inconsistent with these presents: but with this express provision and declaration, that if this deed of settlement should be reduced or set aside, or from any cause become inoperative or ineffectual, then the foresaid deeds of settlement, deeds of tailzie or provision, and other deeds executed by me previous to the date of these presents, shall

(1) 3 Court Sess. Cas. 3rd Series, 148.

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remain valid and effectual, and receive full force and effect in all Courts of law or equity, anything herein contained to the contrary notwithstanding—it being my express will and desire, that if the present deed of settlement is not to be given effect to, my previous deeds for settling and securing the succession to my heritable estates in the persons of my said sons, Captain John Gordon and Charles Gordon, in preference to all other persons, and for making provision to my said daughter, Susan Gordon, shall continue in full force and effect, so that the succession to my heritable estates may be secured preferably, and, in the first place, to my own sons and their heirs whatsoever, before any other person can claim to succeed to me, and that my said daughter may be fully secured in the provisions either now or formerly secured or settled on her."

The Lord Ordinary says: "It was after enumerating all these deeds in his final trust-settlement of 1853 that Colonel Gordon therein explained that his reason for executing that final settlement was, that the titles to his estates in Scotland had now been completed in his own person, and that he was in a position to grant a special conveyance of the whole to his trustees, so as to enable them to complete their titles at once, after his death, without having recourse either to the Court of Session, or to his heirs-at-law, and then the deed concludes with the clause of revocation above recited. On the whole, I am inclined, though not without hesitation, to hold that it is competent to read all these other deeds of settlement of the truster for the following purposes:—(First) To see how far any of them are to stand or receive effect along with his final trust-settlement; (second) To see whether in these deeds, or any of them, the term 'heirs whatsoever' is used in connection with the names of John Gordon and Charles Gordon in such a way as to bear the meaning of 'heirs whatsoever of the body,' and whether, *totâ re perspectâ*, there is any reason to hold that the term was intended to bear a different signification in the final settlement." I think it was competent to read the deeds for the first of those purposes, and having done so I agree with I think all the Judges who have heard this case, that none of these deeds are consistent with the settlement of 1853. What would have happened if the provision which imme-

diately follows had come into operation I need not inquire; as it is they are all revoked simpliciter. I do not think that it was competent to read them for the second purpose, but perhaps that question does not now arise, as the Lord Ordinary does not go further than to say that it was not incompetent to refer to those deeds as shewing that the truster has used the term "heirs whatsoever" in connection with John and Charles Gordon in such a manner as to shew clearly that he has used it, not in its ordinary significance but in the limited sense of "heirs whatsoever of the body." Even if this were competent and established it would have no bearing on the question whether before the final caducial clause, "to my own heirs whomsoever and their assignees," there was to be interpolated a clause in favour of the pursuer, either nominatim or by some apt description, and the heirs of his body.

Reliance was placed on the declaration that the truster's sister Charlotte and the descendants of her body should be excluded from the succession of the said entailed estates. It certainly shews that he had not forgiven her whatever offence it was which she had given him, and not very amiably wished her to know it. But it would be a very startling thing to hold this equivalent to a direction to settle the estates on her brother's children, though her exclusion would thereby be more marked.

If, therefore, your Lordships agree with me, I think that the judgment should be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, the late Colonel Gordon of Cluny, who died on the 16th of July, 1858, by trust disposition and settlement dated the 28th of May, 1853, conveyed his extensive landed estates in Scotland to trustees, with directions to them to execute a strict entail of the larger portion of those estates "to and in favour of my eldest son, the said John Gordon, now Captain John Gordon, and his heirs whatsoever; whom failing to and in favour of my youngest son, the said Charles Gordon and his heirs whatsoever; whom failing to any persons to be named in any deed of nomination to be afterwards executed by me at any time of my life; the eldest heir-female, and the descendants of her body, excluding

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heirs-portioners, and succeeding always, without division, through the whole course of the female succession; and failing such nomination, or of the persons so to be named, and their heirs whatsoever, then to my own heirs whomsoever, and their assignees." The truster directed the remainder of his estates to be settled in strict entail upon the same series of heirs, with this variation, that his younger son Charles, and his heirs whatsoever, were to be called to the succession before the eldest son John and his heirs whatsoever.

Captain John Gordon and his younger brother Charles were illegitimate sons of the truster. Charles, who never married, predeceased his father; and, he and his stirps being extinct, his elder brother became institute in both of the entails directed by their father's trust deed. Colonel Gordon did not exercise the reserved faculty of nominating heirs of tailzie; and his trustees accordingly executed a deed of entail, dated the 4th and 9th of April and 7th of May, 1859, comprehending the whole lands and estates which had been conveyed to them, the clause of destination being an exact counterpart of that which I have already quoted from the deed of trust, with this exception, that the words "whom failing to and in favour of my youngest son, the said Charles Gordon and his heirs whatsoever, whom failing to any persons to be named in any deed of nomination to be afterwards executed by me at any time of my life" were therein omitted.

Captain John Gordon, the institute under the deed of entail executed by his father's trustees, died without issue on the 31st of March, 1878, leaving a trust disposition and settlement dated the 4th of January, 1869, by which he disposed of the whole estates comprehended in the entail, on the footing that they belonged to him in fee simple. The respondents in this appeal are the trustees and beneficiaries under that trust deed.

The appellant, who is the nephew and heir of line of Colonel Gordon, has brought the present action for the purpose of vindicating his right, as an heir of tailzie and provision, to the whole landed estates directed to be entailed by his uncle's trust deed of the 28th of May, 1853. In order to make good that claim, he must establish that the fetters of the entail directed by his uncle

applied not only to the deceased Captain John Gordon, but to himself as one of the substitute heirs of tailzie.

If it be assumed that the clause of destination in the entail of 1859 is framed in accordance with the directions of the truster, there are certain legal results which appear to me necessarily to follow from the terms of that clause, and these the appellant's counsel did not venture to dispute. In the first place, it is trite law, that if the destination to Captain John Gordon and his heirs whatsoever is not to be read as a destination to him and the heirs whatsoever of his body; Captain John Gordon was a fee simple proprietor. In the second place, assuming that the expression "heirs whatsoever" did mean "heirs whatsoever of his body," Captain John Gordon, being the last of the stirps, was proprietor in fee simple, unless the destination was continued by the substitution to him of other heirs under the fetters of the entail. In the third place, the only ulterior destination being to the truster's "own heirs whatsoever and their assignees," the entail came to an end in the person of Captain John Gordon, and he could dispone or settle the entailed estates as he chose.

The appellant cannot therefore make good his present claim, unless he can shew, first, that, by the terms of the entail which Colonel Gordon directed his trustees to make, the first stirps called to the succession was his son Captain John Gordon, and the heirs whatsoever of his body; and secondly, that he, the appellant, was called not as heir whatsoever of the truster, but as a nominatim substitute or as one of the members of a stirps of which his father was the head. The appellant cannot succeed, if he fails in establishing either of these propositions.

By the conclusions of his action, the appellant seeks to set aside the entail executed in 1859 by his uncle's trustees, and all that has followed thereon, including Captain John Gordon's trust disposition in favour of the respondents, and to have a new deed of entail executed in terms of what he maintains to be the directions of his uncle's trust deed. His contention is that, in order to bring the deed of entail into conformity with his uncle's directions, the dispositive clause ought to be altered to the effect of limiting the destination to Captain John Gordon and the "heirs whatsoever of his body" instead of "his heirs whatsoever," and of

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inserting a substitution to the appellant nominatim, and the heirs of his body, before the destination to the heirs whatsoever of the truster and their assignees. Alternatively, the appellant maintains that the destination in the deed of entail executed by his uncle's trustees, must be read as if such limitation and substitution had been actually expressed in it.

The appellant endeavoured to establish, by reference to the terms of a series of mortis causâ deeds executed at various prior dates, that Colonel Gordon intended, in his trust deed of 1853, to limit the class of heirs whatsoever of his son John to heirs of the body, and also that by the term "my own heirs whatsoever" he intended to designate his nearest heir of line, and the heirs of the body of such heir, whom failing his own heirs whatsoever. I have no hesitation in saying that, in construing such a deed as that of the 28th May, 1853, it is, as a general rule, altogether incompetent to refer to deeds previously executed by the same maker, with the view of shewing that he was in the habit of attaching a particular meaning to certain words and phrases. The deeds may, however, be so closely connected with each other as to let in the reference; and such a connection is said to exist in the present case. The deeds which the appellant seeks to bring in are all enumerated in the preamble of the trust deed of 1853, but the truster revokes and recalls them in so far as they are inconsistent with that deed, subject to the declaration that they are to constitute his settlement, in the event of the trust of 1853 becoming, from any cause, ineffectual. I agree with the Lord Ordinary that it is competent to read all these enumerated deeds for the purpose of ascertaining how far any of them are to stand or receive effect along with the final trust settlement. That process involves the necessity of determining, first of all, what is the meaning, according to its own terms, of the trust deed of 1853, and of then considering how far, consistently with that meaning, effect can be given to the prior deeds. But what the appellant proposes to do is to refer to these prior deeds, not for the purpose of shewing that they contain provisions which must still receive effect, notwithstanding the deed of 1853, but in order to impose upon certain words occurring in that deed, a meaning which they do not bear, if the deed be construed by itself. Any

reference, for such a purpose, to the deeds in question appears to me to be altogether incompetent; and I cannot assent to the view of the Lord Ordinary that it is matter of legitimate inquiry whether in these deeds, or any of them, the term 'heirs whatsoever' is used in connection with the names of John Gordon and Charles Gordon, in such way as to bear the meaning of 'heirs whatsoever of the body,' and whether, *totâ re perspectâ*, there is any reason to hold that the term was intended to bear a different signification in the final settlement."

Laying aside these previous deeds, it is, in my opinion, a very nice and difficult question whether, in the trust disposition of 1853, and also in the entail of 1859, the expression "heirs whatsoever" of Captain John Gordon ought not to be read as "heirs whatsoever of the body" of the captain. The appellant, with great plausibility, argues that, had the destination been "to my illegitimate son, Captain John Gordon, and his heirs whatsoever," it would have been equivalent to a destination in favour of heirs whatsoever of his body, because the heirs whatsoever of a bastard are, by plain legal necessity, also heirs of his body, and the addition of the words "of his body," however important in other cases, could not, in his case, have the effect of limiting the class designated as his "heirs whatsoever." And he further argues that, although the trust deed and deed of entail do not describe the late Captain John Gordon as the bastard son of his father, a Court of law is not only entitled but bound, in construing these deeds, to assume the fact of bastardy, as a circumstance which must have been present to the mind of the truster when he executed the deed of 1853. But I am of opinion, with the noble and learned Lord on the woolsack (Lord Blackburn), that the question does not necessarily arise for decision in this case; and that it is, therefore, unnecessary and inexpedient to express any opinion as to the decisions of the Court below, in the cases of *Macgregor* v. *Gordon* (1) and *Gordon* v. *Gordon's Trustees* (2), to which the appellant was not a party. I am of opinion, with my noble and learned friend, that the appellant has utterly failed to establish that he either possesses or is entitled to claim the

(1) 3 Court Sess. Cas. 3rd Series, 148.
(2) 4 Court Sess. Cas. 3rd Series, 501.

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character of an heir of provision and tailzie under the entail directed by the trust deed of 1853. That being the case, the appellant, being an heir whatsoever of the entailer, and not an heir of entail, has no right or title to enforce prohibitions and fetters which are only designed to protect the interest of heirs of entail.

I do not think it necessary to explain, in detail, the grounds upon which I conceive that it is well nigh impossible, consistently with any known principle of law, to expand a direction to settle an estate upon the "heirs whatsoever" of the truster, by the last branch of a tailzied destination, into a direction to make one or more nominatim substitutions in favour of certain members of the class, with a destination over to the remaining "heirs whatsoever" of the entailer. I do not say that such a case is impossible; but I am very clearly of opinion that the trust deed of 1853 contains no indication of the intention of Colonel Gordon that the appellant should take under it in any other character than that of his "heir whatsoever." I refer to the judgment of Lord Young (1) in the Court below, whose reasoning upon this point is, to my mind, entirely satisfactory; and I agree with his Lordship in thinking that the appellant's claim to be considered an heir of provision and tailzie is a hopeless contention.

LORD FITZGERALD:—

My Lords, at the close of the clear and most able argument of the learned Lord Advocate we were all agreed in opinion; but having regard to the magnitude of the stake, we took time to consider the authorities which had been referred to, and also to see whether there was any question in the case necessary for our decision, which we might require to be debated by the counsel for the respondents. My Lords, our further consideration has raised no difficulty, and we are all of opinion that the interlocutor of the Lord Ordinary of the 25th of June, 1881, sustained by the interlocutor of the Lords of the Second Division of the Court of Session, was correct in law and ought to be affirmed, and that the appeal to your Lordships' House should be dismissed.

My Lords, I entirely concur in the opinions which have been expressed by my noble and learned friends and in the reasons

(1) 9 Court Sess. Cas. 4th Series, at p. 76.

which they have given for their conclusions. There is but one matter on which I desire to add a word to what has fallen from my noble and learned friends. I am desirous, for special reasons, to avoid entanglement in the technical expressions of Scotch law; but, divested of technicality, it appears from the pleadings that the object of the pursuer was to obtain the reduction of the deed of entail of 1859, and a declaration that in implement of the directions of Colonel Gordon, the truster, contained in the trust disposition of 1853, the trustees should execute a deed of entail in favour of the pursuer and the heirs whatsoever of his body.

The learned Lord Advocate admitted that in order to sustain the pursuer's contention he was bound to establish two propositions: first, that in the interpretation of the trust disposition of 1853 we should read the destination to John Gordon as a destination to him and the heirs of his body, for otherwise a destination to him as institute and his heirs whatsoever would not be a good tailzied destination, and he would take in fee; and, secondly, that according to what he alleged to be the true intention of the truster we should interpret the disposition of 1853 as if it contained a declaration "tertia" that after the words "and failing such nomination or of the persons so to be named and their heirs whatsoever," and between those words and the limitation "then to my own heirs whomsoever and their assignees," there should be a series of limitations in accordance with the settlement of 1833, or at least a limitation to the pursuer and his heirs whatsoever.

The necessity of establishing this second contention was manifest; for otherwise, following the exact words of the trust disposition of 1853, a destination terminating in the heirs whatsoever of the entailer, and not limited to any particular description, would operate to close the entail, and the last substitute, John Gordon, would be enabled to dispose of the fee. It is on the second proposition alone that I desire to make an observation, as it seems to me to raise a question of construction to be determined not by any rule of law confined to Scotland but by a rule of law applicable to every part alike of the United Kingdom.

My Lords, I confess that I was somewhat startled by the second contention of the pursuer, so ably and perseveringly insisted upon by the learned counsel. My Lords, I quite agree that if it is

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necessary, in order to effectuate the intention of the truster, we should apply to the trust disposition that flexibility of interpretation so often followed in cases of executory instruments. But there is another rule applicable to trust dispositions of an executory character, and which in my judgment ought to govern us in the construction of the trust disposition of 1853, and that rule is that where the truster (as in the present instance) has used terms of art, that is to say, technical terms, which have a known technical and settled meaning, we are bound to give them that settled and technical meaning, unless by necessary implication or some declaration of intention it is manifest that the truster intended them in some other and different sense.

My Lords, it could not be alleged that Colonel John Gordon of Cluny was inexperienced in Scotch conveyancing, or unused to technical terms; and I have not been able to lead myself to think that there is any reason why we should not give effect to the technical terms which he has used in the trust disposition of 1853, according to their technical and established sense.

My Lords, in agreeing with your Lordships' judgment in a cause in which the subject of litigation is of such magnitude, it is gratifying to know that we are following a long train of Scottish decision, and that we are echoing the opinions of four most learned Judges who at present shed lustre on the Scottish Bench.

Interlocutors appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 26th July, 1882.

Agent for appellant: *Andrew Beveridge.*
Agents for respondents: *Martin & Leslie.*

[HOUSE OF LORDS.]

THE CAPITAL AND COUNTIES BANK, LIMITED . . . . . } APPELLANTS;

AND

GEORGE HENTY & SONS . . . . . RESPONDENTS.

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Libel—Innuendo—Evidence of Defamatory Meaning.

H. & Sons were in the habit of receiving, in payment from their customers, cheques on various branches of a bank, which the bank cashed for the convenience of H. & Sons at a particular branch. Having had a squabble with the manager of that branch H. & Sons sent a printed circular to a large number of their customers (who knew nothing of the squabble)—"H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the" bank. The circular became known to other persons; there was a run on the bank and loss inflicted. The bank having brought an action against H. & Sons for libel, with an innuendo that the circular imputed insolvency:—

Held, affirming the decision of the Court of Appeal (Lord Penzance dissenting) that in their natural meaning the words were not libellous: that the inference suggested by the innuendo was not the inference which reasonable persons would draw; that the onus lay on the bank to shew that the circular had a libellous tendency; that the evidence, consisting of the circumstances attending the publication, failed to shew it; that there was no case to go to the jury; and that the defendants were entitled to judgment.

APPEAL from a judgment of the Court of Appeal (Brett and Cotton L.JJ. Thesiger L.J. dissenting) in favour of the defendants, reversing a judgment of the Common Pleas Division (Grove and Denman JJ.). The facts are set out in the report of the case below (1), and in the judgments of Lords Penzance and Blackburn in this House.

The appeal was twice argued; first on November 11, 15, 22, 1881, before Lords Penzance, Blackburn, and Watson by Sir *J. Holker* Q.C. and *C. Russell* Q.C. (*Reid* with them) for the appellants, and Sir *F. Herschell* S.G., and Sir *Hardinge Giffard* Q.C. (*A. L. Smith* with them) for the respondents; and secondly on June 6 and July 12, 1882, before Lord Selborne L.C. and Lords

(1) 5 C. P. D. 514.

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Penzance, Blackburn, Watson, and Bramwell by one counsel of a side.

C. Russell Q.C. (*Reid* with him) for the appellants:—

The plaintiffs succeed if they shew that there was evidence for the jury. It is for the Court to say if the words are capable of a defamatory meaning; and for the jury to say if they had that meaning in fact: *Parmiter* v. *Coupland* (1); *Sturt* v. *Blagg* (2); *Mulligan* v. *Cole* (3); *Watkin* v. *Hall* (4). A Judge ought not to withdraw the case from the jury unless he is satisfied that the words are incapable of such a meaning: *Cox* v. *Lee* (5); *Hart* v. *Wall* (6); *Baylis* v. *Lawrence* (7). That these words were capable of the meaning charged by the innuendo was held by Lord Coleridge C.J. who left the case to the jury, and by Grove and Denman JJ. in the Common Pleas Division, and by Thesiger L.J. in the Court of Appeal. It cannot therefore be said that no reasonable men would impute that meaning. The secret intent of the publisher is not material: *Hankerson* v. *Bilby* (8); *Fisher* v. *Clement* (9). The words must be construed as ordinary, reasonable, persons would construe them, and as the persons to whom the circular was shewn did in fact construe them, viz. that the plaintiffs were insolvent, thus causing a run on the bank and loss to the plaintiffs. There was evidence for the jury that this was the true meaning, in the circumstances attending the publication. The defendants were not customers of the bank; they had never received more than a very few cheques on the plaintiffs' bank. None of the persons to whom the circular was sent could know that there had been a quarrel between the plaintiffs and the defendants. The occasion was not privileged; but if it was there was actual malice.

Sir *F. Herschell* S.G. (Sir *H. Giffard* Q.C. and *A. L. Smith* with him) for the respondents:—

In its primary meaning the circular is not libellous, for it only announces the defendants' intention, and primâ facie the primary

(1) 6 M. & W. 105.
(2) 10 Q. B. 907.
(3) Law Rep. 10 Q. B. 549.
(4) Law Rep. 3 Q. B. 396.
(5) Law Rep. 4 Ex. 284.
(6) 2 C. P. D. 146.
(7) 11 A. & E. 920.
(8) 16 M. & W. 442.
(9) 10 B. & C. 472.

meaning must be imputed. If a secondary meaning is imputed evidence of facts must be given to shew it, and none was given. The result of the authorities is that when words are capable of two meanings, one innocent and one libellous, the Judge must withdraw the case from the jury, unless the plaintiff gives extrinsic evidence in support of the libellous meaning. The only thing that can be libellous is the supposed reason for the act of the defendants; it is sought to make them liable for an inference drawn from their words. The same result might have followed from a bare refusal to take cheques on the bank, and that clearly would not have been actionable. What was injurious was the defendants' conduct; and no action lies for such conduct. The occasion was privileged, and there was no evidence of actual malice.

Reid replied.

The House took time for consideration.

Aug. 1. LORD SELBORNE L.C.:—

My Lords, I have read with interest the able and instructive opinions of those of your Lordships who have endeavoured to ascertain with exactness the respective provinces of Judge and jury in a question of libel or no libel, when the alleged libellous meaning is not to be collected, according to ordinary rules of construction, from the mere words which the defendants have used. Into that inquiry I will not follow them further than to say, that the authorities which I think most material are *Woolnoth* v. *Meadows* (1), *Wood* v. *Brown* (2), *Wright* v. *Clements* (3), *Goldstein* v. *Foss* (4), *Hearne* v. *Stowell* (5), and *Capel* v. *Jones* (6). I should willingly have deferred to the experience, learning, and ability of those who have thought the evidence in the present case proper to be left to a jury, if the disagreement from them of others not less entitled to respect had not compelled me to trust more than I could have wished to my own judgment. The Court of

(1) 5 East, 463.
(2) 6 Taunt. 169.
(3) 3 B. & Ald. 503.
(4) 6 B. & C. 154.
(5) 12 A. & E. 719.
(6) 4 C. B. 259.

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Appeal has thought that there was no evidence to go to a jury, and I must be satisfied that their judgment was wrong before I can say that it ought to be reversed.

I do not understand any of the learned Judges in the Courts below to have been of opinion (nor do I think it is the opinion of any of your Lordships) that the question of libel or no libel must always, and necessarily, be left to a jury as to words not in themselves (i.e. in their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments) libellous, without some evidence either of a libellous purpose on the part of the writer, or of some other extrinsic facts calculated to lead reasonable men to understand them in a libellous sense. I should myself be very sorry if such were the law.

In *Sturt* v. *Blagg* (1) Wilde C.J. said: "It is the duty of the Judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the Judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it." If the Judge, taking into account the manner and the occasion of the publication and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury. In deciding on the question whether the words are capable of that meaning he ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form, as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest, as implied in the publication, those particular motives or reasons.

The alleged libel, in the present case, is a printed circular sent through the post by the defendants (brewers at Chichester) to certain of their own tenants and customers, giving them notice that the defendants "would not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The meaning ascribed to this document by the innunendo is, "that the plaintiffs were not to be relied upon to meet the

(1) 10 Q. B. 908.

cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers." The question is, whether there was evidence to be left to the jury in support of that innuendo. From the words, standing by themselves, it appears to me to be impossible to collect such a meaning, on any known principle of construction. By construction, merely, the only conclusion to be arrived at is, that they mean exactly what they say, viz., that the defendants had come to a resolution not to receive in payment of any moneys due or to become due to them, from the persons to whom that circular was addressed, cheques drawn on any of the branches of the plaintiffs' bank. For such a resolution they might have had various motives and reasons, good, bad, or indifferent. To mention some, which (whether morally right or not) would be remote from any question of libel, the defendants might (as the fact really was) have taken offence at some conduct on the part of the plaintiffs' agents; or they might have found that mode of payment, from some cause or other, inconvenient; or they might have had greater facilities for cashing cheques drawn upon the branches of some other bank (e.g. the London and County Bank); or they might wish, as far as their influence went, to favour some competitors of the plaintiffs in the business of banking. They were under no obligation to give, and they did not give, any reason; and it would, in my opinion, be arbitrary and not reasonable, to imply, from the mere words of the circular, an imputation upon the plaintiffs' credit or solvency. The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense. Sometimes (perhaps generally) that test may be satisfied from the mere words of the document; in this case, I think it is plain that the mere words of the document are not enough for that purpose.

What, then, were the circumstances under which, and who were the persons to whom, this circular was published? In order to consider how they, as reasonable men, ought to be supposed to have understood it, all that had passed between Messrs. Henty and the plaintiffs' manager at Chichester (however material to the actual intention of the defendants) must be disregarded.

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What had so passed was unknown to the persons to whom the publication was made. Most of those persons were tenants of, and the rest were purchasers of beer from, the defendants. They resided at various places in Sussex and the neighbouring counties. The practice of the defendants had been to collect, from time to time, by their travellers, moneys due to them from those persons, and to accept payment from them (wholly or in part) by cheques on local banks. Among the cheques which, in the ordinary course of business, were likely (or not unlikely) to come into the hands of these persons, and which therefore they might be likely (or not unlikely) from time to time to offer in payment to the defendants, some were or might be drawn upon different branches of the plaintiffs' bank, as others were or might be drawn upon different branches of the London and County Bank; both which had branches at Chichester and at several other places in the neighbouring district of Sussex and Hants. When such persons received an intimation that the defendants would not accept payment from them in cheques drawn upon branches of a particular bank, I cannot see why, as reasonable men, they should infer from it more than was said. It related to the mode of conducting, for the future, a regular course of business between themselves and the writers, as to which it was proper and reasonable (if the creditor had formed such a resolution) that the debtor should be informed of it. It is not (as I understand) disputed that the defendants were entitled to decide for themselves what cheques they would accept or decline to accept in payment from their debtors, or that such a communication from them to their tenants and customers, if made bonâ fide, was by law privileged. This being so, I cannot perceive how persons standing in that relation to the defendants (whether one individual only, or few persons, or many) could reasonably draw a libellous inference from the mere fact of their receiving such a communication, unless the words of the circular, taken in their natural sense, conveyed the supposed imputation upon the plaintiffs. The publication was to those persons, and to those only, to whom, if the defendants meant merely what they said, it would naturally be addressed. No evidence was given from which (as it seems to me) a jury could have been justified in concluding that those to whom this

circular was sent were intended to disseminate it amongst others, with whom the defendants had no business relations. On the contrary, there was uncontradicted evidence that the defendants did not send it to all their customers, but only to those whom they thought likely, at some time or other, to offer payment by cheque on the plaintiffs' bank. It seems that some of those who received the circular did, in fact, shew it to some strangers: but I cannot think that any such communication by them to strangers, unauthorized by the defendants themselves, could properly be evidence in support of the innuendo. If it had been publicly placarded by the defendants on the walls of Chichester or other towns, or had been advertised by them in newspapers, or sent by them through the post to persons with whom they had no business relations, this might have been evidence of a malicious intention, beyond what was expressed by the mere words of the document; but nothing of that kind was done.

It was said that the defendants, by some other mode of wording the circular, might have prevented mischief. But if it was actually so worded, and so published, as in itself to furnish no reasonable ground for any libellous interpretation, I cannot perceive that they were under any necessity of saying more, to repel an inference which what they had said did not justify. It was suggested that they might have made some distinction between the plaintiffs' branch at Chichester and their other branches. But the offence which they had taken at the conduct of the plaintiffs' manager at Chichester (whether reasonable or not) would have made any such exception of the Chichester branch inconsistent with the determination, which they had actually formed, to have no dealings which they could avoid with that gentleman. I may add that the circular in its actual terms does not seem to extend to the central or head office of the plaintiffs' bank in London. If an exception in favour of the Chichester branch would have prevented any inference adverse to the plaintiffs' credit, why should such an inference be drawn when branches only were mentioned? There was no evidence that any single person to whom the circular was sent by the defendants acted upon it in a manner injurious to the plaintiffs. Mr. Smith, a customer of the plaintiffs, was one of those persons; he came to the manager of

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the plaintiffs' Landport branch, and produced to him the circular, asking what was the meaning of it, but he did not withdraw or reduce his account with the bank.

There was no evidence of any extrinsic fact affecting the reputation or credit of the plaintiffs' bank at the time which could be connected with the circular, so as to give it a meaning to those who read it which it might not otherwise have had. I cannot but think that under the old system of pleading a statement of some extrinsic facts of this nature on the record would have been necessary to support the innuendo, having regard to the absence of any sufficient ground for it in the words of the document; and this for reasons not technical (*Goldstein* v. *Foss* (1); *Hearne* v. *Stowell* (2); *Capel* v. *Jones* (3)). And although no such matter of inducement need now be stated on the record, it seems to me that without some evidence of facts which, when connected with the words of the document, would justify the meaning imputed to it, such a case ought not to go to a jury. I did not collect from the argument that the loss which the plaintiffs had suffered in the preceding month, from a defalcation by one of their agents, was sufficient to have in any way affected their reputation or credit, or was relied on by them for that purpose. Their real reliance was upon what afterwards happened; namely, the extraordinary run upon the branches of their bank, which took place during the first and second weeks after the circular was issued. Before the second week the West of England Bank had failed, and its failure had been preceded by certain sinister reports which found their way into some London newspapers. Some evidence was undoubtedly given which tended (though not, I think, in any very clear or definite manner) to connect rumours relative to the defendants' circular with the run which took place during the first (at all events) of those two weeks. But such rumours, or any consequences which they may have had, could not properly have been left to a jury as evidence tending to give a libellous meaning to the circular, if the publication itself (for which alone the plaintiffs were responsible) was not otherwise proved to be a libel. Lord Coleridge, as I understand him, thought this part of the evidence proper to go to the jury, not for the purpose of

(1) 6 B. & C. 154. (2) 12 A. & E. 719. (3) 4 C. B. 259.

proving the innuendo, but only to prove special damage if the circular were found to be a libel. I cannot, however, help thinking that if the run upon those branches of the plaintiffs' bank had not happened when it did, there would have been a much more general agreement among the judges before whom this case has come; and, indeed, it is tolerably certain that, in that case, the action would never have been brought.

Apart, therefore, from the facts which bear directly upon the question of the defendants' purpose and intention, but which were unknown to the persons who received the circular, I find no evidence that this was a libel proper to be left to a jury. As to those facts (which were not in controversy), it appears to me that evidence of pride, anger, ill-temper, or unreasonableness, is an entirely different thing from evidence of an intention (not otherwise proved) to cast imputations upon the credit or solvency of the plaintiffs' bank. I think there was more than enough evidence of pride, anger, ill-temper, and unreasonableness. In the excellent summing-up of Lord Coleridge there is but one thing said, as to the effect of the evidence, with which I cannot agree, and that is his intimation to the jury that, although nothing which had previously passed might have justified the conclusion that the defendants had a malicious intention, some evidence of such an intention might be derived from their reply to Messrs. Stuckey & Co.'s last letter threatening an action. It seems to me to be impossible justly to draw an inference of that kind from such a reply to such a letter, unless there were other circumstances sufficient to justify it. I should not have thought that any reasonable man, who knew all that had passed between the defendants and Mr. Hooper, could have put upon the circular the construction that an imputation on the plaintiffs' credit or solvency was really thereby intended; and if not, I am unable to understand how the same facts can be evidence in support of the innuendo. The defendants were angry, not indeed without reason, but beyond the bounds of reason; and they determined as far as possible to have no dealings with those who had offended them. They stated, openly and frankly, to the plaintiffs' manager, what (unless conciliated) they would do, in terms not favourably distinguishable, to my mind, from those of the circular which they

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afterwards sent out. The answer which they received was not conciliatory: and in it the manager said that he was "quite indifferent as to their sending out orders to their tenants not to cash the bank's cheques." I do not regard this as in the nature of a permission (if the manager could have given it) to the defendants to publish a libel concerning the plaintiffs; but it does seem to me to be strong evidence that the plaintiffs' manager (whom I suppose to have been a reasonable man, and as well capable of comprehending the defendants' meaning at that time as he was afterwards) did not understand the act threatened by the defendants, or the communication proposed to be made by them to their tenants, as implying any imputation upon the credit or solvency of the bank. If it had been the necessary or legitimate consequence of the action which the defendants took, that their circular should be understood, or be likely to be understood, by reasonable persons receiving it, in a libellous sense, they must be taken (for all purposes of legal responsibility) as having intended that consequence. But I have already said that I think this was not either the natural sense of, or a reasonable inference from, the words which they used, or the act which they did; and the whole evidence appears to me to be against the supposition that they themselves intended it to convey that meaning.

The result is, that I think there was no evidence on which a jury could have been justified in finding that the defendants published a libel concerning the plaintiffs. The document, not being a libel on the face of it, is not shewn to be so by any extrinsic evidence proper, in my judgment, to be considered by a jury for that purpose. Before it can be deprived of the privilege which it would undoubtedly possess if bonâ fide sent to the persons to whom it was addressed for the purpose appearing on the face of it, one of two things is necessary,—either the defendants should be shewn to have sent it for some ulterior purpose not covered by that privilege (of which I see no evidence), or it must be shewn properly to bear the libellous meaning imputed to it.

These are my reasons for being unable to differ from those of your Lordships who are of opinion that the judgment under appeal is right, and that this appeal should be dismissed with costs; and I shall move your Lordships accordingly.

LORD PENZANCE:—

My Lords, this is an action of libel, the issues in which have been tried before the Lord Chief Justice and a jury; the jury disagreed and there was no verdict; before the case could be set down again the defendants applied to the Common Pleas Division to enter judgment for them in accordance with Order XL., rule 10, of 36 & 37 Vict. c. 66, upon the ground that the Court had before it all the materials necessary for finally determining the matters in dispute without the verdict of a jury. The Common Pleas Division refused the application, which has, however, been acceded to, and judgment entered for the defendants, by the Court of Appeal. It is from that judgment that the present appeal is made.

The case is one of considerable interest. It involves questions of first principle in the Law of Libel, and it has been the subject of contrary determinations in the Courts below. The Lord Chief Justice, and two judges of the High Court of Justice, took one view of the case, which was supported by Thesiger L.J. in the Court of Appeal, while an opposite view has been expressed by Brett and Cotton L.JJ. in the judgment which is now under appeal.

As the facts of the case are of the first importance, I will proceed to state them. The defendants, Messrs. Henty, carry on the business of brewers at Chichester. The plaintiffs are the "Capital and Counties Joint Stock Banking Company," having numerous branches in the provincial towns, and amongst others a branch at Chichester. The defendants have numerous tenants and customers, from whom they are in the habit of receiving money, and on some occasions they had received in payment of moneys due to them cheques drawn upon the plaintiffs' bank. Some of these cheques would be drawn upon branches of the bank other than the Chichester branch, and as the defendants carried on business at Chichester, it was of course a convenience to them if those cheques could be all cashed at the Chichester branch. This convenience had, before the time when the present disputes arose, been conceded to them. It is obvious enough, however, that this could only have been done in reliance on the credit of Messrs. Henty, for the managers of the Chichester branch had no means

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of knowing whether the person whose name was signed to any such cheque had an account with the branch upon which he drew it, nor whether the signature to the cheque was in his handwriting, nor what the state of his account might be.

In this state of things it so happened that a new manager (Mr. Hooper) was placed at the head of the Chichester branch, and shortly afterwards Mr. Wright, a clerk of Messrs. Henty, presented on their behalf a cheque for £5, drawn on the Petersfield branch of the plaintiffs' bank. Mr. Hooper who knew neither the drawer of the cheque, nor Messrs. Henty, nor Mr. Wright, refused to cash it. Thereupon Messrs. Henty addressed to Mr. Hooper the following letter, with respect to which it must be noted that the "Hampshire and South Wilts Bank" therein mentioned, is in fact, the same as the plaintiffs' bank:—"26th November 1878. Sir,—It has always been our practice to cash the cheques drawn on the local or district branches of the banks of this city, and with that understanding we have allowed our tenants to cash such cheques and give them to our collector. If you intend to adopt an *isolated* policy, we shall issue an order to our tenants *not* to cash Hampshire and North Wilts cheques—at least with the intention of paying our collector with them. Our Mr. Wright will early to-morrow (Wednesday) present the cheque that you refused to cash to-day, and on it will depend the good feeling that has rested between us and the Hampshire and North Wilts Bank. We are, Sir, your obedient servants, George Henty and Sons."

Mr. Wright did, in accordance with this letter, present the cheque again the next day, which was the 27th of November 1878, and Mr. Hooper cashed it; but he thought it right, after the letter he had received containing the threat by Messrs. Henty that they would issue "orders to their tenants not to cash Hampshire and North Wilts cheques," to write to Messrs. Henty and explain that he did so as a matter of grace only, and that he would do so in future if he had Messrs. Henty's authority for so doing, but that he must repudiate the threat which had been held over him. His letter was as follows: "29th November 1878. Gentlemen,—In reply to your favour of the 26th instant I beg to inform you that I most certainly decline to cash cheques on other branches of our Company when presented by parties unknown

to me, though, as a matter of grace I am quite willing to cash cheques to your representatives, if properly introduced to me with proof that they have power to sign for your firm. I am quite indifferent as to your sending out orders to your tenants not to cash our cheques. Yours faithfully, P. Mortimer Hooper."

On the 2nd of December the Messrs. Henty issued the following printed circular, in consequence of which the present action has been brought against them: "Messrs. Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts). 2nd December, 1878."

There is some evidence that the effect of this circular was to cause the run upon the plaintiffs' bank, which undoubtedly took place soon after it was published. The defendants proved that they only sent this printed circular to 137 persons, all of whom were either their tenants or their customers, and they alleged that they were all persons by whom they thought it was likely that they might be offered cheques on the plaintiffs' bank in payment of the moneys due from them. There was no proof, however, that they had in fact on any previous occasion received such cheques from any particular individuals among these persons. In fact, the proof regarding the number and amount of such cheques which they had been in the habit of receiving was very deficient. On the other hand, it was proved by the plaintiffs that in the last twelve months there were no more than three such cheques presented by the defendants at the Chichester branch for payment, and the amount of the whole three did not exceed £47.

When the run on the bank took place, the plaintiffs' solicitor wrote to the defendants and threatened legal proceedings; the defendants, in reply, repudiated all intention of injuring the bank, and left the plaintiffs to their remedy. It has been contended upon this that the defendants' conduct in not offering to retract their circular or take any steps to mitigate its effect, is evidence of a malicious intention on their part. But they were not asked to take any such step, and the threat of legal proceedings was, as it seems to me, sufficient to account for their standing on the defensive, and abstaining from an interference from which it might be inferred that they knew they had been to blame.

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The contention of the defendants on this state of facts is, that their circular was no more than an honest, innocent, and justifiable announcement on their part to their customers that in future they must not expect that Messrs. Henty would receive in payment any cheques on the plaintiffs' bank; that Messrs. Henty had a right to refuse such cheques if they liked, and had also a right to announce their determination to do so to their customers, so as to prevent their being taken by surprise and put to inconvenience by this departure from their previous practice. And, if this is the fair conclusion to be drawn from the facts, there can be little doubt, I think, but that they are not liable in this action; for, passing by for the moment all question whether the circular ought to be considered libellous as conveying an imputation on the plaintiffs' credit, injurious to them in their trade, the occasion of this circular being published would upon the above supposition be so clearly a privileged occasion that nothing but proof of express malice would sustain the action, and express malice is upon the same supposition obviously excluded.

But the plaintiffs put a very different construction on the facts. In their view the occasion of the circular was not an honest or innocent one, but was invented and contrived out of anger, or petulance and ill-temper, at the manager of the bank presuming to throw any impediment in the way of the defendants' convenience. They therefore maintain that the circular was not privileged, but malicious, for that it was not a statement "fairly made in the discharge of any public or private duty, legal or moral, or in the conduct of their own affairs in matters in which their interests were concerned." I here use the definition of a privileged communication given by Parke B., with the assent of the Court, in *Toogood* v. *Spyring* (1), which has been cited with approval in several subsequent cases.

The plaintiffs put the case in this way:—They say, to begin with, that no real and genuine reason existed why the defendants should refuse to take the cheques in question from their customers, after the correspondence with Mr. Hooper, any more than before it. For, first, the number of such cheques was ridiculously small in number and amount, not having exceeded in the previous year

(1) 1 C. M. & R. 193.

three in number and £47 in value; secondly, Mr. Hooper had agreed to cash them in future, provided Messrs. Henty would comply with the very reasonable request that they should write him a letter authorizing Mr. Wright to receive payment of them on their behalf; and, lastly, if the cheques were not cashed at the Chichester branch, they might always with all other cheques have been remitted for collection to Messrs. Henty's bankers at Arundel at the end of the week, in accordance with Messrs. Henty's ordinary practice in that respect. The need, therefore, for any step such as that which they took—a step which could not be taken without some trouble and expense—did not exist, and the true motive of their conduct must be sought for elsewhere. But further they say that there are other circumstances which shew the true light in which Messrs. Henty were acting. Mr. Percival Henty, one of the defendants, when asked whether it would have given him much trouble to have given Mr. Wright a note to say that he was authorized to get the cheque cashed, replied that it would, and on being pressed again and again, he said it would have given him a great deal of trouble to do so. And yet he took what was surely far greater trouble, in composing the circular, correcting the proof when printed, and directing and posting no less than 137 letters for the distribution of it to 137 persons, of whom not more than three at the most, supposing the figures of the preceding year not to be exceeded, could in any way be benefited by its reception; and all this to avoid what he called the "great trouble" of writing a short note to Mr. Hooper giving authority to Mr. Wright.

And again, Mr. Douglas Henty, another of the defendants, volunteered to say, "They" (that is the plaintiffs) "said they were indifferent; so we acted on their word 'indifferent.'" This word was the expression Mr. Hooper had used in his letter in reference to the defendants' threat; and when the defendants say they acted on that, they seem rather to refer their conduct to the effect produced upon them by the terms of Mr. Hooper's letter, than to any substantial inconvenience or difficulty which the circular, it is now said, was designed to remove.

But further, the plaintiffs point to the language of the circular itself, as shewing that it was not framed for the genuine purpose

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of meeting any difficulty raised by Mr. Hooper. That gentleman would, of course, cash, and be bound to cash, all cheques drawn on the Chichester branch (supposing, of course, that there were assets to the credit of the drawer), and no possible difficulty had arisen, or could arise, in reference to such cheques; and yet the circular is so drawn as to make no exception of cheques drawn on that branch, but all cheques drawn on "any of the branches of the Capital and Counties Bank" are involved in a repudiation so general, that if any one of those who received the circular had known, or guessed, the sort of difficulty which had arisen about the £5 cheque, he could hardly have imagined the circular to be solely intended to meet that difficulty.

In a word, the plaintiffs contend that the circumstances of the case were quite sufficient to warrant a conclusion in the minds of a jury that all need for the circular was a mere pretence; that it was not dictated by a real or honest desire to save the defendants' customers inconvenience; but that it was solely conceived and designed in a spirit of petulance, if not actual ill-will, against the plaintiffs, and to let the plaintiffs feel the weight of a threat to which Mr. Hooper announced himself to be "indifferent."

Now, if this is the fair result of the facts (and there was I think, abundant evidence to justify a jury in so finding, if they chose to do so), I confess that I think it puts a different complexion on the whole matter. I cannot doubt that in this aspect of the facts there was no privileged occasion, and even if there were, there would be upon the above supposition what the law calls actual malice.

It seems to me, therefore, impossible for your Lordships to decide whether the plaintiffs had a good cause of action, without the previous decision of a jury as to the true objects, intentions, and motives of the defendants in the course they pursued, and as to how far (even supposing their original motives and objects to have been innocent), they exceeded, either in the language of the circular, or in the number of persons to whom they distributed it, the line of conduct which would be justified by those motives and objects. It is true that one of the defendants said they only sent the circular to persons from whom they thought they were likely to receive the cheques in question: but whether this was

the case or not would also be matter, I think, for a jury to determine.

Until these matters of fact and the proper conclusions to be drawn from them are established, I confess that I am at a loss to see how the Court below, or your Lordships, can determine the question whether the publication of the circular gave a good cause of action, or not. The majority of the Court of Appeal appear to have thought, not that these matters of fact were for the Court to determine, but that, however they were determined, and whatever conclusions might properly be drawn from them of actual malicious injury on the part of the defendants, the plaintiffs could have no cause of action; and they have, therefore, refused to send the matter to a jury, and have given judgment for the defendants.

I will state as shortly as I can why I consider this to be wrong.

For this purpose I must assume for the moment, that a jury might have found that this circular was issued, if not with an actual desire to injure the plaintiffs, at least in petulance and anger, and with indifference whether it caused injury to them or not; and that the supposed convenience of the defendants' customers was a mere excuse and blind, to justify them in taking a step which would shew the plaintiffs that it was not well to defy their threats, and that it would be advisable in future to consult their convenience. I must also assume that the jury might find that the number of people to whom the circular was sent was far larger than any innocent dictates of convenience would warrant.

Upon the assumption that either of these conclusions might be arrived at by a jury, it has to be determined whether this action of libel can be maintained. But here the preliminary question has been raised: Is it for the Court, or for a jury, upon a given state of facts and circumstances, to say whether the publication complained of is libellous or not?

To sustain the judgment now under appeal (which has withdrawn everything from the jury) it is necessary that your Lordships should come to the conclusion that whatever view may be taken of the facts, it is for the Court and not for the jury, to determine whether the circular did, or did not, in its terms

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amount to an actionable libel. I do not know whether the respondents intended to go so far as to say that the Court, without the intervention of a jury, can in all cases determine a publication affirmatively to be a libel; but I do understand them to assert that the Court, whatever the jury might think, is at liberty to hold that the publication is not a libel.

There is no doubt that in past days, when special pleading was still in full force, it was held to be necessary that the plaintiff should set forth on the face of the record the publication itself, together with such facts as, taken in connection with it, would enable the Court to see that he had a cause of action. It is hardly necessary to cite authorities for this; but I may mention the cases of *Clement* v. *Fisher* (1); *Wood* v. *Brown* (2); *Wright* v. *Clements* (3).

I do not conceive that the principle involved in these decisions went any further than this, that the Court required it to be shewn to them on the record (so that a Court of Error could deal with it if need be) what the publication was, in order that they might judge whether a jury could reasonably, and without doing violence to the principles and limits of the law of libel, pronounce the publication to be libellous. In other words, the Court required to be satisfied that the matter of the publication might, without doing violence to its language, have such a meaning attached to it, or such a construction put upon it, as to render it libellous; and, subject to this limitation, it devolved upon the jury to say whether it was libellous or not.

This is precisely the view taken of the law by the Court of Queen's Bench in *Blagg* v. *Sturt* (4), where Parke B. left to the jury the question whether "they believed the innuendo as to the meaning of the letter" or not. It was contended that he ought not to have done so. Lord Denman, delivering the judgment of the Court, said, "We are of opinion that the libel is capable of the meaning imputed by the innuendo, and as the jury have found it to be true, and the judge is not dissatisfied with the verdict, the rule will not be granted." Similar language was used in the Exchequer Chamber in the same case upon appeal. "Undoubtedly

(1) 7 B. & C. 459.
(2) 6 Taunt. 169.
(3) 3 B. & Ald. 503.
(4) 10 Q. B. 904.

it is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it."

Although special pleading has passed away, I do not consider that the law has been thereby altered, and I look upon the case first quoted, therefore, not as declaring any change in the law on the subject, but as placing in its true light what the law always has been, namely, that it is for the Court to say whether the publication is fairly capable of a construction which would make it libellous, and for the jury to say whether in fact that construction ought, under the circumstances, to be attributed to it. To go further than this would be to say that the question of libel or no libel, is at one and the same time a question for the jury, and a question also for the Court, which would surely be an anomaly in English law; and that the question ought to be left to the jury, with this proviso, that they can only determine it effectively in the negative; for if they determine it in the affirmative their opinion will go for nothing, inasmuch as the Court will afterwards determine the same question for themselves without reference to their verdict. The only other alternative would be that which the Court of Appeal in this case have adopted, namely, not sending the case to a jury at all. This is in fact saying that, although the plaintiff alleges in his innuendo that the circular in question was calculated to give rise, in the minds of those to whom it was addressed, to the inference that the defendants impugned the credit of the plaintiffs' bank, the Court will settle for itself, not whether any such inference could reasonably be drawn from it by a jury, but whether any such inference would be drawn from it by persons of the class to which it was addressed (for that is the question), and the opinion of a jury is not needed. I very much doubt whether there is any authority for thus dealing with the question of libel.

When the cases which have a contrary aspect come to be examined, it will be found that they in no wise favour the proposition that the question of libellous construction should be withdrawn from the jury, but establish only that the plaintiff must shew on the record such a publication, and such extraneous facts,

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if any, connected therewith, as to leave room for a jury properly to declare it libellous. I will shortly refer to two of these cases. In *Goldstein* v. *Foss* (1) the supposed libel was a publication emanating from a trade protection society, and stating that the plaintiff had been reported to the society as improper to be balloted for as a member thereof. This statement, standing by itself, was held by the Court not to be a publication properly capable of a libellous construction, for that there might be many reasons, and arbitrary rules, which might stand in the way of the plaintiffs' election without any injurious imputation upon him; nor, indeed, did the plaintiff so put his case. What the plaintiff contended gave a libellous character to the publication, was the fact that it was the practice of the society in question to use this form of publication as a means of conveying to the members of the society the information that a person so reported as not fit to be a member of it was a swindler, and could not be trusted. This fact the plaintiff had alleged in his declaration; and if he had alleged it with sufficient certainty, it was not denied by the Court that the publication was libellous. But unfortunately for him his pleader was held not to have stated this fact with sufficient certainty to satisfy the requirements of justice in those days. It all turned upon the use of the words, "the said society," which, taken in connection with the context, were thought to convey an ambiguous reference; and so the judgment was arrested, and the plaintiff lost the benefit of his verdict; a signal instance indeed of the length to which, in those days, the destructive criticism of the Courts in construing legal proceedings was carried. But no complaint was made of misdirection by the judge in leaving the question to the jury; nor did the Court profess to differ with the jury as to the publication being libellous, upon the facts which the jury had before them; deciding only that the most important of those facts ought to have been stated on the record, and that it was not so stated.

The case of *Hearne* v. *Stowell* (2) is of a similar nature. The libel complained of consisted of a charge against a Roman Catholic priest, that a most degrading penance, performed on a public road, had been imposed by him on a penitent; and he

(1) 6 B. & C. 154. (2) 12 A. & E. 719, 730.

complained that this charge had injured him in his character of Roman Catholic priest. This was the substance of the declaration. The judge left it to the jury to say whether the publication was libellous, and they found that it was. A new trial was moved for on the ground of misdirection, and refused; but the judgment was arrested because there was no statement on the record informing the Court of the conduct which a Roman Catholic priest ought to pursue in imposing penance. Passing by some other objection which had been made, Lord Denman said, "This we need not discuss, for an independent objection appears which we think must prevail. We are not informed by the declaration, and, of course, we can take no judicial notice, of the manner in which the plaintiff's character could suffer from the imputation, being ignorant of the conduct which a Roman Catholic priest ought to pursue in imposing penance." The learned Judge went on to deny that the fact of the jury having found it to be a libel was enough to cure this defect, and insisted that "the facts and circumstances that give a sting to a publication apparently innoxious ought to be brought to our notice; for we could not possibly direct judgment, either in an indictment or an action against a libeller, without seeing that a libel has been published by him." This then was the decision; it in no way impugned the finding of the jury; still less did it declare the judge to have misdirected them in leaving the question of libel for their consideration: but it rested wholly upon the proposition that those facts which, in the opinion of the Court, were necessary to establish the libellous character of the publication, were not stated on the record, although they might have been, and indeed were, to some extent, given in evidence before the jury. Like the last case, it was a case of special pleading and nothing more. I am confirmed in my opinion as to the true bearing of this decision by the comments upon it of the Court in the case of *Capel* v. *Jones* (1): "It is somewhat remarkable that the plaintiffs have not ventured to aver that the alleged libel is calculated to injure them in their calling of stockbrokers. In all these cases if, by any reasonable intendment, a jury could infer that the publication complained of reflects on the moral conduct or the professional

(1) 4 C. B. 264.

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reputation of the plaintiff, it is the duty of the Court to send the matter before them. But the instances are by no means rare of judgment being arrested, when the Court has thought that by no reasonable intendment could the libel bear the construction put upon it by the innuendoes. Of this class is the case of *Hearne* v. *Stowell* (1). There . . . the Court arrested the judgment, holding that the publication was not, on the face of it, libellous; and refusing, even upon the assumption that the plaintiff was charged with imposing the penance, to intend that the jury had evidence before them of an injury to the plaintiff, which the declaration did not shew, though some evidence to that purpose was in fact given."

I will quit this part of the subject by citing the opinion of a learned judge, who was, at least, as well versed in questions of the character I am considering, and the niceties upon which judgments used to be arrested, as any of his contemporaries; I mean Lord Wensleydale. In *Parmiter* v. *Coupland* (2), that learned Judge is reported to have said: "A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury are to exercise their judgment and pronounce their opinion as a question of fact." The learned judge is here only speaking of libels which affect reputation and character; but I am not aware that those which affect a man's credit in his trade stand upon any different footing.

I am therefore of opinion that if a publication, either standing alone, or taken in connection with other circumstances, is reasonably capable of a libellous construction, it is for a jury, and not for the Court, to say whether a libellous construction should be put upon it. The question being not what a Court of Law might understand by it, but what inferences the class of people to whom it is addressed would draw from the language used, it is properly and essentially a question of fact, and as such properly devolves upon a jury. I do not mean to assert that the jury is free to draw an inference of defamation, whatever the language of the

(1) 12 A. & E. 719. (2) 6 M. & W. 105, 108.

imputed libel may be. The Court have the right, and the duty, to hold a check upon the action of the jury in such matters, and to see that the defamatory inference is one which without doing violence to the language, can be reasonably drawn. But it has no right to go further and reject the defamatory inference, because it is not a necessary inference, or one which the Court itself would draw. There is I conceive considerable danger in the Court usurping the function of the jury, and by a too narrow criticism of the language of a publication, rejecting inferences which, though perhaps not logical, are such as people of illogical minds (who are perhaps the majority) would draw. For it must be remembered that the question of malice, and the question whether certain language is or is not defamatory, are distinct, and whatever is held not to be defamatory is equally not defamatory, though published with the most malicious intentions and objects. It is not difficult for a malicious man to injure his neighbour by carefully selected language, avoiding a direct charge, or anything like a necessary inference of discredit; and if your Lordships should hold the present publication to be innocent, you will I fear go far to invite such attempts.

But assuming that it is for the Court, and not for the jury, to say whether this circular was libellous, I am, I confess, strongly of opinion that such a question ought to be answered in the affirmative. I doubt whether any man of business could read this circular, and not be led to the conclusion, that the defendants had their misgivings as to the plaintiffs' solvency; I do not mean to say that there might not possibly be other reasons for refusing to take any of the plaintiffs' cheques, on whatever branch they might be drawn; but the first and obvious reason would be, that the defendants doubted if such cheques would be paid.

In general mankind do not refuse to take any form of payment in respect of which they feel a confidence that it will, without difficulty, be convertible into money. There are, no doubt, in the world eccentric individuals who may have a morbid preference for one bank note or security over another, or a morbid detestation of some particular form of monied security; which preference or detestation are quite independent of the validity, the soundness,

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and the easy convertibility of the securities in question. But these fancies are not to be found among business men, and provided that a note, or cheque, or security for money, is known by them to be perfectly certain to be easily and promptly convertible into cash, it is quite beyond any experience that I possess, to believe that such securities would be refused. It has been said in argument that there might be numerous reasons for refusing to take the plaintiffs' cheques besides the reason that their credit was doubtful, and that it is therefore unreasonable to pitch upon this last as the meaning to be conveyed by the defendants' circular. But although this has been said, I have not heard any of these so-called numerous reasons stated or suggested, nor have I been able to imagine any of them, except, perhaps, the extra trouble involved in having to cash cheques on various branches of a country bank. But this interpretation of their meaning is excluded by the fact that the circular equally extends to cheques drawn on the Chichester branch, which there would be no difficulty or trouble in cashing. And I cannot help here remarking that if the circular had run in this way, that Messrs. Henty "would not in future accept any cheques drawn on the plaintiffs' bank except those drawn on the Chichester branch" (which is what they now say they meant), no imputation injurious to the bank's credit could have been drawn from it, and no trouble could have arisen. But in whatever way the circular was capable of being interpreted, I still think that an imputation on the plaintiffs' credit would be the first and most obvious reason for it, which would arise in the mind of any one reading it. It must always be remembered that the persons to whom it was sent knew no more than the public at large; they knew nothing of the squabble with Mr. Hooper, and had no other key to the meaning of the circular than would have been possessed by the first man in the street who might have read the circular if it had been posted on the walls of the town.

Now it was admitted by the respondents' counsel in argument, and I think also by the learned judges in the Court below, that if such a circular as this had been indiscriminately published, as by sticking it on a wall, it would have had the effect of damaging the plaintiffs' credit. The responsibility for a publication may be

affected by the mode in which, and the persons to whom, the publication is made, but the meaning of the words, and the reasonable inferences to be drawn from them (supposing always that they have no special significance to the particular persons to whom they are addressed) must be the same, however published; and if the meaning and effect of the circular would have been injurious to the plaintiffs' credit if stuck upon a wall, why should it not have the same meaning and the same effect if received, by a man, in an envelope? I am not at this moment discussing whether the sending of this circular was in fact, under the circumstances, the publication of a libel. I have already said that, provided it was done innocently, as a matter of business, within the definition given by Parke B. in *Toogood* v. *Spyring* (1), it was a protected communication, and one which, without proof of actual malice, would not sustain this action. But I am assuming the contrary of all this; I am assuming that it was no innocent step taken in the course of business, but a wilful act done without need or necessity, and with intent to punish or injure the plaintiffs, and solely for that purpose, and so published; I am considering the question whether the circular contained imputations damaging to the plaintiffs' credit or not; and in this point of view I am quite unable to perceive why the circular, if posted on a wall, should carry one meaning to a reader, and if received, by the same reader, in an envelope, should convey another and different meaning.

The innocence and lawfulness of this circular has, in argument, been sustained by some very ingenious reasoning. Suppose, it is said, that this paper had only been sent to one person, would it be libellous? The answer, I think, depends on the motive or object which dictated it. If it was sent with the honest desire to save that person the inconvenience of having cheques drawn on the plaintiffs' bank refused in payment by the defendants' collector, it would not be libellous. If it was sent with the sole desire to cause annoyance or injury to the plaintiffs, I see no reason why it should not be libellous though only sent to one person. A libel does not require publication to more than one person. But then it is said, Surely the defendants had a right to refuse the

(1) 1 C. M. & R. 193.

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plaintiffs' cheques; and if they had a right to do so, why had they not a right to say they should do so? This mode of argument appears to me to beg the question. Every man has, but for the law of libel, a right to say or write what he pleases. His pen and tongue are his own, and the only law that restrains the use of them (I am excepting, of course, those occasions upon which words written or spoken become acts) is the law of libel. To assert, therefore, that in the case supposed a man has a right to issue a circular of this character, is to assert that it would not be a libel if issued, which is the very point that has to be established.

There are cases, no doubt, in which although a man acts maliciously, or with a desire to annoy or injure another, he may not be responsible, because he is only exercising some right that belongs to him, such as erecting on his own land some structure of a kind which he knows will annoy his neighbour, for the sole purpose of effecting that result. Many other cases might be put in connection with positive rights, the exercise of which does not cease to be lawful, though the motive that dictates and shapes their exercise may be malicious. But the right of publishing statements which are injurious to another is not a right of this kind; it is a right only subject to the limitations of the law of libel, and if it exceed those limitations it becomes an actionable wrong.

Some illustrations may be put. A bill-discounter, or banker who discounts bills of exchange, may have made up his mind not to discount A. B.'s bills, and he may not know, and probably could not know, which of his customers might bring such bills to him for discount. Would he be justified then in sticking up against the walls of his office, or sending to all his customers, a notice that he would not discount any bill on which A. B.'s name appeared? And if it was proved, from his own declarations, that he did not in the least doubt A. B.'s solvency in fact, but that he had done this with the express purpose of injuring A. B.'s credit, would he be free from liability as having only told his customers that he meant to refuse A. B.'s bills, which he had a right to refuse if he pleased?

A similar case may be put from social life. It would be quite

permissible that a man should refuse a friend's invitation to his house, because he knew that he should meet A. B. there, and he did not wish to do so. But would it be permissible that he should issue a circular to all his friends at whose houses he might expect to meet A. B., and announce to them that he should refuse to meet him, and should refuse all invitations to do so? And if this might be done innocently, and for the genuine purpose of avoiding A. B.'s society, which he had a right to do, would it still be innocent, and not libellous, if it turned out that he had done it on purpose to throw a slur upon A. B.'s character?

I cannot doubt that these questions must be answered in the negative. To say that a man is at liberty maliciously to injure another by a written publication without any better excuse, or occasion for making it, than the indulgence of animosity, spite, or passion, and that the injured man is without redress, is to say that the law of libel does not exist. Malice has always been held to be the gist of an action of libel; and the only difference between what is called a privileged occasion, and one not so privileged, is that the law infers malice in the latter case, while it requires proof of actual malice in the former; but when that proof has been given the right of action is complete whatever the occasion may be. Assuming that an imputation against character, or credit in trade, is untrue, injury to the plaintiff and malice on the part of the defendant are, in my opinion, the efficient elements of an actionable libel. All this is fully discussed in the judgment of the Court delivered by Bayley J. in *Bromage* v. *Prosser* (1).

Then again, it is said that the circular, in terms, said nothing about the plaintiffs' credit, and that it would be enlarging the language of it, without warrant, to construe it in a sense injurious to that credit. But the actual words of a publication are, in my opinion, by no means the limit of the ideas and impressions which they may be calculated to convey. The case of *Woolnoth* v. *Meadows* (2), affords a good example of this, where it was held that words which not only did not charge a criminal offence, but which, on the face of them, did indeed repudiate such a charge,

(1) 4 B. & C. 257. (2) 5 East, 463.

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were, nevertheless libellous as being calculated to convey to the hearers of them a criminal imputation. "Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade, or business, are actionable," said Bayley J. in *Whitaker* v. *Bradley* (1). In Mr. Holt's book on Libel the following is the second definition given of what constitutes a libel against a private person—"Libels which have a tendency to injure him in his office, profession, calling or trade." That this "tendency" is the true test of the publication being libellous or not, and not the mere primary meaning of the defendant to be gathered from the words he has used, is, I think, well established by authority.

In *Haire* v. *Wilson* (2) the judge had left it to the jury to say whether the defendant intended to injure the plaintiff. This the Court held to be wrong. "If the 'tendency' of the publication was injurious to the plaintiff, then the law will presume that the defendant by publishing it intended to produce that injury which it was calculated to effect. If it had that tendency, no doubt it was a libel," said Littledale J. In that case the intention of the defendant to injure the plaintiff was inferred from "the tendency" of his publication. This case is stronger against the defendant, for the hypothesis upon which I am considering whether the circular is libellous is, that the defendant did actually intend to injure the plaintiff.

It comes to this, therefore, in my opinion, that the only real question which arises in determining whether the language of this circular is libellous, is whether it would be calculated to raise in the minds of those to whom it was addressed, an imputation against the solvency or credit of the plaintiffs, or not. For the reasons I have already given, I am of opinion that it was so calculated, and if it properly devolves upon your Lordships to say whether the language of the circular is libellous, I am therefore of opinion that it was so. But, as I have above stated, this question is, in my view of the law, a question for the jury and not for the Court; the language of the circular being capable of the construction which the plaintiffs have put upon it in their innuendo.

(1) 7 D. & R. 650. (2) 9 B. & C. 645.

Upon the whole then, this case ought, I think, to be again submitted to a jury. As to the language of the circular, the question for the jury would be whether, putting such a meaning and construction on it as in their opinion would be put on it by the persons to whom it was addressed, an imputation against the plaintiffs' credit would be thereby conveyed; and if so, they should find the circular to be in its language libellous, it being for the plaintiffs to establish that proposition to their satisfaction. But the main question for them would arise upon the circumstances under which, and the persons to whom, the circular was published. These matters should be left to the jury, to enable the judge and the Court to determine whether the occasion was a privileged one or not, as was decided in *Bromage* v. *Prosser* (1). If the jury should find that the circular was innocently published in discharge of a duty, or as a matter of business, within the definition above referred to (which was given in *Toogood* v. *Spyring* (2)), the publication would be privileged. The onus of establishing that it was so lies, I think, upon the defendants.

A third question, as a matter of law, presents itself, whether, although the occasion was privileged, there was any actual malice on the defendants' part; but in the circumstances of this case this question hardly arises, except as a matter of form; for the considerations which would induce the jury to find the circular to have been issued innocently, in discharge of a duty, must practically negative all actual malice in taking that step.

I therefore think that the judgment of the Court of Appeal should be reversed.

LORD BLACKBURN:—

My Lords, the plaintiffs' claim is thus stated: "1. The plaintiffs are bankers, and the defendants are brewers. 2. The defendants falsely and maliciously wrote and published of the plaintiffs the letter following: 'Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts). Westgate, Chichester, 2nd December, 1878.' Meaning thereby that the plaintiffs were not to be relied

(1) 4 B. & C. 257. (2) 1 C. M. & R. 193.

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upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers."

The statement of defence sets out the circumstances under which the defendants allege that the letter was published, and proceeds: "9. The defendants thereupon, as they lawfully might do, sent to their said tenants the letter in paragraph 2 of the statement of claim set out, which is the writing and publishing complained of, and for which the present action is brought. The defendants deny that the said letter under the circumstances aforesaid is a libel. 10. The defendants say that the occasion of sending the said letter to their tenants as aforesaid was privileged. 11. The defendants deny the innuendo alleged in paragraph 2 of the statement of claim, and say that the said letter does not bear the said alleged meaning. 12. The defendants deny each and every of the allegations set forth in paragraph 3 of the statement of claim."

On the trial evidence was given on both sides, and on the proof being completed the case was left to the jury, who did not agree, and were discharged. The plaintiffs desire that the case should go for trial before another jury. The defendants' contention is, that they are entitled to judgment on the ground that, if the jury had found in favour of the plaintiffs every circumstance relating to the publication which the evidence could prove, and even though the jury had found that, in their opinion, the letter was libellous, the Court ought to come to the conclusion that the letter published under those circumstances was no libel, and acting on its own conclusion give judgment for the defendants, not setting that verdict aside as not satisfactory, but letting it stand and giving judgment for the defendants, notwithstanding that verdict. If this is right, it follows that the case ought not to be sent to another jury.

The decision of the cause depends, first, on the question what is the province of the Court in an action for libel, and whether, where the writing is such that opinions might differ as to whether it is a libel or not, the Court can give judgment for the defendant, on the ground that, though the jury have found that, in their opinion the writing is a libel, the Court do not think it made out

to be a libel; that is a question of great public interest; secondly, whether, supposing that this can be done, the state of the evidence in this case as to the publication is such that the Court ought to come to the conclusion that this is no libel. This is of importance to the parties, but except in so far as it may illustrate the meaning of the first general proposition, it is not of general importance. I have had and still have very great difficulty in making up my mind on this second branch of the case. I will first state my opinion on the first question.

A libel for which an action will lie, is defined to be a written statement published without lawful justification, or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule. It must be shewn by evidence that there was a writing, and that it was published. I shall afterwards say something as to what publications are privileged, so as to afford a lawful justification or excuse for the publication, though calculated to convey a libellous imputation. But, independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.

I think that from the earliest times it has, by the law of England, been the province of the Court to say whether words published in writing were a libel or not; and in order that a Court of error might have before it the materials for enabling it to say whether the decision of the Court below was right or not, the plaintiff was, by the old rules of pleading, required to place all those materials, on which he relied, upon the record. The words themselves must have been set out in the declaration or indictment, in order that the Court might be able to judge

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whether they were a libel or not. And this still remains the law (see *Bradlaugh* v. *The Queen* (1); *Harris* v. *Warre* (2)).

In construing the words to see whether they are a libel, the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he may have written in levity only. As was said in the opinion of the judges delivered in the House of Lords during the discussion of Fox's Bill, I think quite justly, no one can cast about firebrands and death, and then escape from being responsible by saying he was in sport.

If there were circumstances relating to the publication which it was alleged caused the words to bear a more extended sense than they would otherwise do, the law was that those must be stated on the record, in order to enable the Court to judge whether the words understood with reference to those circumstances bore that more extended sense, or else those circumstances could not be looked at in favour of the plaintiff. Great nicety was required in setting out those circumstances, and the rule of pleading has been altered in that respect by the Common Law Procedure Act, 1852, and the Judicature Act; but the law which gave rise to the old mode of pleading has not been altered by those Acts. I shall say more as to the effect of this change in the mode of pleading afterwards. It never was disputed that there was much which could only be decided by the jury. Whether the words as published bore the meaning alleged where there was an innuendo, or any libellous imputation where there was no innuendo, was a question which the defendant could raise on the general issue, and the jury must decide that question when raised.

But there were a series of decisions, the last and most important of which was the famous case of the Dean of St. Asaph. The

(1) 3 Q. B. D. 607. (2) 4 C. P. D. 125.

fullest and best report of that case is that prepared by Lord Glenbervie, and published under the name of *R.* v. *Shipley* (1). The headnote, I think very accurately, states what was decided by the majority of the Court. "On the trial of an indictment for a libel the only questions for the jury are the fact of publication, and the truth of the innuendoes. The question of libel or no libel is necessarily a question of law for the sole consideration of the Court out of which the record comes, and on which the judge at the trial is not called upon to give his opinion to the jury." Lord Mansfield laid it down that "by the constitution the jury ought not to decide the question of law whether such a writing, of such a meaning, published without a lawful excuse, be criminal. They cannot decide it against the defendant, because after verdict it remains open upon the record; therefore it is the duty of the judge to advise the jury to separate the question of fact from the question of law; and as they ought not to decide the law, and the question remains entire upon the record, the judge is not called upon necessarily to tell them his own opinion. It is almost peculiar to the form of prosecution for a libel that the question of law remains entirely for the Court upon the record, and that the jury cannot decide it against the defendant; so that a general verdict that the defendant is guilty is equivalent to a special verdict in other cases. It finds all which belongs to the jury to find, and finds nothing as to the question of law. Therefore when a jury have been satisfied as to every fact within their province to find, they have been advised to find the defendant guilty, and in that shape they take the opinion of the Court upon the law." (2)

Willes J. dissented from the reasons given by Lord Mansfield, though agreeing in his conclusion that there should not be a new trial, and that the judgment of the Court should be given on the verdict found in that case, as on a verdict of guilty. And it is worth while to point out in what respect he dissented. Willes J. said, "I conceive it to be the law of this country that the jury, upon a plea of not guilty, or upon the general issue, upon an indictment or information for a libel, have a constitutional right, if they think fit, to examine the innocence or criminality of the paper, notwithstanding there is sufficient proof given of the publi-

(1) 4 Doug. 73. (2) 4 Doug. 164, 165.

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cation. Secondly, I conceive it to be law that if, upon such examination, the jury should, contrary to the judge's direction, acquit the defendant generally, such a jury are not liable either to attaint, fine, or imprisonment; nor can this Court set aside the verdict of deliverance by a new trial, or by any other means whatsoever" (1). He proceeds to shew that he thought that a direction to the jury, that if they were satisfied of the truth of the innuendoes and publication they were bound in point of law to find the defendant guilty, though sanctioned by many great authorities, was wrong. He says: "So far as my opinion goes, I am still free to confess I think it is fit, it is meet and prudent that the jury should receive the Law of Libels from the Court. But if my concession is extended an iota further, to mean that under all the circumstances, if the innuendoes are proved, the jury are bound to find, and must find, the defendant guilty, I must beg leave to repudiate the idea; as upon the maturest consideration I say the jury are not bound to find the defendant guilty, but may give a general verdict of acquittal without being obliged to give their reasons" (2).

It seems to me clear that whilst Lord Mansfield held that the question of libel or no libel was one exclusively for the Court, Willes J. held that it was also a question for the jury; but he did not hold it to be a question exclusively for the jury. On the contrary, whilst holding that if the jury found the defendant not guilty it was conclusive in his favour, he expressly held that after a verdict of guilty it still was competent for the defendant to take the opinion of the Court as to whether the publication was libellous or not. He says (p. 176), "If it" (the tract which the Dean had published) "contains nothing but what Lord Somers would have approved, and the Convention Parliament have warranted" (which is what the Dean had asserted in an advertisement) "then the publication is harmless and inoffensive; but if it tends to excite the people to take arms, to alter the established representation of this country without the consent of Parliament, it may not only be seditious but nearly treasonable. I give no opinion upon this head, as this will be a proper subject of discussion if a motion is made in arrest of judgment." A motion was made in

(1) 4 Doug. 171. (2) 4 Doug. 174, 175.

arrest of judgment, and the judgment was arrested. I have never seen any report of the grounds on which the judgment was arrested.

It is no longer material whether Lord Mansfield or Willes J. was right in his view of the law as it stood in 1784, for by 32 Geo. 3 c. 60 it is enacted by the 1st section what the law shall be in future. The Legislature has adopted almost the words and quite the substance of that part of Willes J.'s judgment which I have first quoted; and from that time, A.D. 1792, there can be no doubt that a defendant cannot be convicted of libel unless the jury find that the tendency of the publication was libellous. But the Legislature, passing an enactment in favour of defendants, had no intention to put them in a worse position than before, and to make the verdict of a jury conclusive against the defendants. Nor did they enact that the judge might not in this, as in other criminal cases, direct the jury to acquit because he thought that the case had failed in law; it would, I think, have been very injudicious to do so, for jurors are sometimes excited against defendants, though more commonly they are excited in their favour. And the Legislature by the 4th section provided that the defendant should still, though found guilty by the jury, have the power to take the opinion of the Court on the question of law, by moving in arrest of judgment as before that Act.

The case of *R.* v. *Shipley* (1) was a criminal proceeding at the instance of the Crown, and 32 Geo. 3 c. 60 is in terms confined to such proceedings. But though no doubt the Court has more power to set aside verdicts in civil cases, there is no reason why the functions of the Court and jury should be different in civil proceedings for a libel, and in criminal proceedings for a libel. And accordingly it has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel.

It certainly had always been my impression that there was a difference between the position of the prosecutor, or plaintiff, and that of the defendant. The onus always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputa-

(1) 4 Doug. 73.

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tion, and if he failed to satisfy that onus, whether he had done so or not being a question for the Court, the defendant always was entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libellous imputation. If the defendant can get either the Court or the jury to be in his favour, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the Court and the jury to decide for him.

Now it seems to me that when the Court come to decide whether a particular set of words published under particular circumstances are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges might, not unreasonably, hold such words to be libellous. In fact whenever a verdict has passed against a defendant in a case of libel, and judgment has been given in the Court below, those who bring their writ of error on the ground that there was no libel, assert that both the jury and the Court below have gone wrong: but they are not called upon to say that the words were incapable of conveying the libellous imputation; it is enough if they can make out, to the satisfaction of the Court in error, that the onus of shewing that they do convey such an imputation is not satisfied; and there are numerous cases in which, after a verdict for the plaintiff and judgment for him, that judgment has been set aside in error.

It was argued by the appellants' counsel at your Lordships' bar that, if the words were capable at all of conveying the libellous imputation, the plaintiff had a right to have the question left to the jury. I asked for authorities for the proposition laid down by the plaintiffs' counsel, in addition to the expressions used by Grove J. and Denman J., which certainly look as if those learned Judges took that view. Two, and only two authorities were produced. Some expressions used by Wilde C.J. in delivering the judgment of the Exchequer Chamber in *Sturt* v. *Blagg* (1) were cited, but they, I think, do not bear the meaning supposed. No question of this kind was

(1) 10 Q. B. 908.

before the Court; the decision of the Court is in the last sentence of the judgment—"With or without the innuendo in either case, I think the plaintiff entitled to judgment: for the letter in itself discloses a cause of action, and is also such as to justify the finding of the truth of the innuendo"—and in my opinion no one who reads the letter can doubt that this was quite accurate.

The other case relied on as an authority was *Hart* v. *Wall* (1), where the Common Pleas, consisting of Lord Coleridge and Lindley J., set aside a nonsuit entered by Archibald J. after consulting Quain J. If the letters there complained of were only actionable as being in the nature of slander of title, it would seem that the nonsuit was right, for there was no evidence that the defendant was doing more than defend his own title, no evidence of malice—and malice is necessary to support that action; but if the letters contained libellous imputations on the plaintiffs personally, evidence of malice was not required. Lord Mansfield expressly said in *R.* v. *Shipley* (2): "Every circumstance which tends to prove the meaning is every day given in evidence, and the jury are the only judges of the meaning, and must find the meaning;" and if the words were reasonably capable of a meaning which in the opinion of the Court would be libellous on the plaintiffs personally, I think there can be no doubt that it ought to have been left to the jury to say whether the words bore that meaning, and the nonsuit was wrong; and those who prepared the headnote in *Hart* v. *Wall* (1) seem so to have understood the decision in banc.

I am unable on perusing the report to make out what was the meaning which the letters were supposed to be capable of bearing, which it was held would be libellous. And it may be that it was thought not only that it was for the jury to find the meaning (which Lord Mansfield admitted), and also that the jury were not bound to find for the plaintiff, whatever the Court might think, unless the jury thought the publication such that the meaning was calculated to convey a libellous imputation—which since Fox's Act, if not before, I think is the law—but also that if the jury found those questions for the plaintiff it was conclusive on the Court, unless they could see that the words were incapable of

(1) 2 C. P. D. 146. (2) 6 Doug. 164.

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conveying such an imputation; and if such was the decision in *Hart* v. *Wall* (1) it is an authority for the argument of the plaintiffs' counsel, and as far as I know the only one. And I think there is authority against it. I think no one can read Sir W. Jones' tract, for the publication of which the Dean of St. Asaph was indicted, and particularly the latter part of it, as set out in the indictment (2), beginning with the suggestion as to what the people were to do if a few great Lords or wealthy men were to get the King in subjection, and manage the Parliament, and say that the words were incapable of conveying a suggestion that the people should arm and drill themselves, so as to be prepared by force to resist the Government so long as Parliament was managed by those few great Lords or wealthy men. I can hardly believe, as has been sometimes suggested, that it was held that when the indictment set out the words (3), "The Common Laws are just, but the King (meaning our said Lord the King) and Parliament (meaning the Parliament of this realm) may alter them when they please," the innuendoes were bad, because there was not an express averment that these words were published of and concerning the King and Parliament of this realm; for I think the words in their natural sense bear that meaning. Yet the Court of King's Bench unanimously arrested the judgment, which I think can only have been on the ground that, though the words were capable of conveying that seditious meaning, the Court thought that the prosecution had not satisfied the onus which lay on them to shew that they were so published as to be calculated to convey it.

And I think that subsequent decisions shew that this principle has been acted upon. I do not think it necessary to cite any other cases than *Hearne* v. *Stowell* (4) and *Goldstein* v. *Foss* (5) there referred to. *Hearne* v. *Stowell* (4) was a peculiar case. The defendant at a meeting called for the purpose of petitioning Parliament against the grant to the Roman Catholic college at Maynooth, read a written document, and made some verbal statements at the same time. The action was in different counts for publishing the document as a libel on the plaintiff, and also for the words,

(1) 2 C. P. D. 146.
(2) 4 Doug. 80.
(3) 4 Doug. 78, 79.
(4) 12 A. & E. 719.
(5) 6 B. & C. 154.

coupled with the document, as slanderous on him in his profession. The judge ruled, and the Court of Queen's Bench held rightly ruled, that the occasion did not afford any privilege, and directed the jury to find for the plaintiff if they thought the matter libellous. The report does not say what was the direction as to the counts for slander. The jury found for the plaintiff. And I should infer, though it is not so stated in the report, that the damages were assessed only in respect of the count for libel. The written document would be libellous according to the ordinary definition which had been repeated by Parke B. in *Parmiter* v. *Coupland* (1), if "calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule." It does not seem to me possible to contend that the document which the defendant read was not capable of being read as meaning that the plaintiff, Mr. Hearne, had required one of his flock to crawl on his hands and knees for several hours a day on the roughest part of the pavement of the public street by way of penance. And if the judge gave to the jury the ordinary definition of libel (and as no complaint was made of his summing-up he must, I think, have done so) the jury must by their verdict have found that it had this meaning, and that in their opinion the statement was calculated to injure his reputation by exposing him to hatred, contempt, or ridicule.

Both the argument and the judgment are exclusively directed to the question as to the count for libel, which was of course much the most favourable for the plaintiff; and probably, though the report does not say so, the damages were assessed on that count only. The Court, though the jury had found it a libel, arrested the judgment, because in the opinion of the Court it was not one. They say: "But the learned counsel for the plaintiff further denied that there was after verdict any defect on the record, urging that, as any words may be used in a defamatory sense, and these are alleged to have been injurious to the plaintiff's character, and the jury have found them to be so, we must now assume that they were so. A distinction was taken between libel and slander, all questions respecting the former being supposed to be expressly referred to the jury by Mr. Fox's Act. From this consideration

(1) 6 M. & W. 108.

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was deduced an argument that the Court has no power to arrest the judgment in actions for libel, because they are wholly removed by the Act from the cognizance of the Court, and exclusively submitted as matters of fact to the jury. From these propositions we must express our dissent. It is not enough, to entitle a plaintiff to judgment, that he should charge malicious motives and a calumnious tendency; he must also shew that there is a libel. The words composing it may naturally convey such a meaning, and even the most innocent may possibly deserve that name, because they may in themselves have been used with that intent and in that sense. But in such case the facts and circumstances that give a sting to a publication apparently innoxious ought to be brought to our notice, for we could not possibly direct judgment either in an indictment or an action against a libeller, without seeing that a libel has been published by him. The consequence of a contrary doctrine would be inevitably this, that any words whatever, whether sensible or otherwise, whether conveying any kind of imputation or not, and stripped of all explanation, would support a charge of libel, if only accompanied with general complaints of the intent to injure character. Several cases are opposed to this notion. We need refer to no other than the well considered case of *Goldstein* v. *Foss* (1) as fully sustaining the defendants' argument on both points. The judgment was arrested there for a similar defect. We were desirous of considering whether the defendant was entitled to a new trial, because the learned judge ought to have told the jury to acquit on the plea of not guilty. If the learned judge had been pointedly required to do this, he might have declared his opinion on the question of law now discussed, or he might have reserved the point for the Court. If he had told the jury that the paper proved was a libel *when the Court was of opinion that it was not*, we should have been bound to set aside a verdict so obtained for misdirection. But the defendant took a different course," &c.

The alleged libel in that case in its natural sense and without any inducement at all, imputed to the plaintiff conduct which, if believed, would in the opinion of the jury have injured his reputation by exposing him to hatred, contempt, and ridicule, and

(1) 6 B. & C. 154.

therefore was a libel. The Court took a different view and acted on their own view and arrested the judgment. The plaintiff might have brought error, and plausibly enough have asked a Court of Error to say that they agreed with the jury and not with the Court of Queen's Bench, but he acquiesced in the judgment.

Goldstein v. *Foss* (1) contained several counts; the first contained averments of introductory matter, which if it had been properly connected with the libel and innuendo, would in the opinion of Abbott C.J. and Littledale J. have supported the action. Bayley J. only says that it might have done so. But all three agreed that it was not so connected. This is a strong illustration of what has often been said, that the technical nicety of pleading required was such that a plaintiff with a very good case might fail unless he employed a very skilful pleader; and no doubt the alteration in the law of pleading made by the Common Law Procedure Act 1852, 15 & 16 Vict. c. 76, s. 61, was in consequence of this and other similar decisions. But besides this first count there were others in which the libel stood thus:—"Correspondence 1825. Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I am directed to inform you that the persons undernamed, or using the firms of Goldstein" (the plaintiffs and some others named) "are reported to this society as improper to be proposed to be balloted for as members thereof." On this Abbott C.J. after pointing out that the innuendo that the plaintiff was a swindler was too large, but that it might on these counts be rejected as surplusage, says, "Then is the import of the libel itself such as can be made the subject of an action? There may be fixed arbitrary rules which prevent the election of certain persons as members of the society; persons of a certain age or certain trades may be excluded; and there may be so many reasons why a person may be deemed unfit to become a member of the society, without casting any injurious reflection upon him, that I think we cannot possibly say with any degree of certainty that such was the intention with which this alleged libel was published" (2).

I may observe here that I agree with what was argued at the Bar, that *Fisher* v. *Clement* (3) shews that the real question was

(1) 6 B. & C. 154. (2) 6 B. & C. 159.
(3) 10 B. & C. 472.

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not what was the intention with which the libel was published, but what was the tendency of the libel as published; and consequently that Abbott C.J., if correctly reported, made the same verbal slip in *Goldstein* v. *Foss* (1), which he afterwards, as Lord Tenterden, made in *Fisher* v. *Clement* (2). But, subject to this slight correction, I think Abbott C.J. here states not only that it was a question for the Court whether the publication was shewn to be libellous, but correctly states the principle on which the Court is to proceed, viz., that unless the plaintiff has so far satisfied the onus which lies on him to shew it to be a libel that the Court can, with sufficient certainty, say that the writing has a libellous tendency, they should not so say. The plaintiff in *Goldstein* v. *Foss* (1) did not submit to this judgment. He brought error, but the judgment was affirmed (3).

The Common Law Procedure Act 1852 s. 61 was intended to remove the difficulties which a plaintiff had in putting a real cause of action on the record, with sufficient technical precision. But it was not intended to alter the law, or to deprive the defendant of his right to ask the Court to say that words alleged to be a libel, or actionable slander, though found by the jury to be so, were not so in the judgment of the Court. It deprived him of his right to move in arrest of judgment, for the materials, on which the question whether the words written or spoken were used in the defamatory sense has to be decided, are no longer on the record. But when the proof is complete, and all that can be properly found on that proof in favour of the plaintiff is found for him, the Court have, I think, exactly the same power that they had before, and if they are of opinion that if all which could be found had been put on the record under the old system, the judgment would have been arrested, they should give judgment for the defendant. This was done, and I think rightly done, in *Mulligan* v. *Cole* (4).

This brings me to the question on which there has been a difference of opinion amongst the Judges of the Court of Appeal, and on which I have felt and still feel great difficulty, namely,

(1) 6 B. & C. 154.
(2) 10 B. & C. 472.
(3) 2 Y. & J. 146.
(4) Law Rep. 10 Q. B. 549.

whether the evidence here was such as would justify a jury in finding that the publication was such, and so made, that the Court would not say, after a verdict for the plaintiff, that the Court thought it not sufficiently shewn to be a libel.

The proof given shewed, I think, some facts, and might have justified a verdict finding others. Messrs. Henty & Co. carried on business as brewers at Chichester, but kept no banking account there, their bankers being at Arundel. Their practice, as it appears from the evidence, was on each Saturday to send the cash, and such cheques, not drawn on a Chichester bank, as they then held, to their bankers at Arundel. The London and County Bank, and the Capital and Counties Bank, had each a branch in Chichester. The managers of these branches had no more means of knowing whether a cheque drawn on another branch of their bank was genuine, or whether the person who drew it had funds in that branch sufficient to meet it, than if the cheque had been drawn on a bank with which they had no connection, and they were no more bound to give cash for a cheque on one of their own branches than for a cheque on a bank with which they had no connection. But, no doubt with a view to encourage persons to be customers of their other branches, they appear to have given cash for such cheques to any one who they believed would be responsible for the cheque if it was not honoured, without charging any commission. Messrs. Henty had been in the habit, when they took any such cheques early in the week, instead of keeping them till Saturday, and then sending them to Arundel, of sending them to the Chichester branch of the London and County Bank, or the Capital and Counties Bank, as the case might be, and getting cash for the cheques at once. This was a convenience; not a very great one, but still a convenience.

On Tuesday the 26th of November, 1878, Messrs. Henty sent to the Chichester branch a cheque for £5, which they had received, drawn on a different branch of the Capital and Counties Bank, but there was a new manager, and he would not give cash for the cheque. Then Messrs. Henty sent this letter :—" Westgate, 26th November, 1878.—Sir,—It has always been our practice to cash the cheques drawn on the local or district branches of the

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banks of this city, and with that understanding we have allowed our tenants to cash such cheques, and give them to our collector. If you intend to adopt an *isolated* policy, we shall issue an order to our tenants *not* to cash 'Hampshire and North Wilts' cheques —at least, with the intention of paying our collector with them. Our Mr. Wright will early to-morrow (Wednesday) present the cheque that you refused to cash to-day, and on it will depend the good feeling that has rested between us and the Hampshire and North Wilts Bank. We are, Sir, Your obedient servants, Geo. Henty & Sons. To the Manager of the Chichester branch of the Hampshire and North Wilts Bank." The manager did, on the 27th of November, give cash for the £5 cheque then brought to him, but apparently having taken offence at the tone of this letter, he wrote as follows:—"The Capital and Counties Bank, formerly styled, Hampshire Banking Company.—Chichester, 29th November, 1878. Gentlemen,—In reply to your favour of the 26th instant, I beg to inform you that I most certainly decline to cash cheques on other branches of our Company when presented by parties unknown to me, though, as a matter of grace, I am quite willing to cash cheques to your representatives, if properly introduced to me with proof that they have power to sign for your firm. I am quite indifferent as to your sending out orders to your tenants not to cash our cheques. Yours faithfully. P. Mortimer Hooper, Manager. Messrs. Henty & Co., Westgate."

The letter alleged to be a libel was, on the 2nd of December, 1878, written. So far the facts are not in controversy. The plaintiffs gave no other evidence that it was published by the defendants than was contained in the defendants' answer to interrogatories. That answer admitted that they did, on that 2nd of December, send the letter to a large number of persons named (I think 138 in all), but at the same time stated that they were all tenants of the defendants, or persons who took their beer from them, and that the letter was not sent to any persons who were not in the habit of remitting or likely to remit to them in cheques on the Capital and Counties Bank; and no attempt was made, either by evidence on the part of the plaintiffs, or by cross-examination of the defendants' witnesses, to shew that the letter was sent to any one not in such a position. Evidence was given

that the letter did in fact become known to persons who were not in that position, and that there was a run on the bank in December. It is certainly not to be taken as proved that the run was occasioned by this letter, for it was shewn that the West of England Bank had stopped payment on the 7th of December, and that rumours as to its position had prevailed before. But though it may well be said that this was the main cause of the run, yet if the letter was libellous, it might aggravate the run, and there was evidence, therefore, that the letter did cause the bank damage. There is not, as far as I can see, any suggestion on the evidence that Messrs. Henty knew that there was such a failure as that of the West of England Bank impending, and that it was likely to cause all persons to inquire as to the stability of such a bank as the plaintiffs', still less that they sent out the letter to persons whom they knew to be likely to make such inquiries. Nor do I see anything to justify the inference that those to whom the letter was sent were desired, or intended, to make it generally known. The question, therefore, seems to me whether, by shewing such a publication the plaintiffs have so far satisfied the onus which is on them, that the Court can (to adopt Lord Tenterden's language) with reasonable certainty say that the tendency of the letter was to convey the libellous imputation.

There can be no doubt that the defendants were not required to take cheques drawn on this bank on account of any debts due to them, or in any other way whatsoever, and had a right to refuse to do so. No reason was needed to justify such a refusal. Such a refusal could not be made without using words which, whether written or spoken without sufficient occasion to give rise to a privilege, would be actionable if the tendency of those words would be to cast a doubt on the credit of the bank. I think however, that there are so many reasons why a person may refuse to take on account the cheques drawn on a particular bank, that, acting in the spirit of what Lord Tenterden said in *Goldstein* v. *Foss* (1), the Court could not say that the letter, which in terms goes no further than merely to state the fact, was libellous, as tending to impute a doubt of the credit of the bank. No doubt some people might guess that the refusal was on that ground, but

(1) 6 B. & C. 462.

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as Brett L.J. says, it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. I do not think it libellous by itself to state the fact. But I quite agree that such a statement might be published in such a way, and to such persons, as to shew that its natural tendency would be to convey an impression that the person refusing to take the cheques on that bank did doubt its credit, and then it would be libellous.

I do not much like to express an opinion on a state of things not before me, but I think I may safely say that in a time of panic a statement published in the City article of one of our newspapers, that such a one had withdrawn his account from such a bank, might have a tendency to shake the credit of that bank, and that those who published such a statement in such a way would know, or ought to know, that it would be read by persons who come to the paper for information to guide them as to whom they would trust; and therefore the statement would very probably be understood by such persons as conveying an imputation on the credit of that bank. And a statement such as that contained in the letter, if published in such a way, though less obviously connected with the credit of the bank, might perhaps also be so construed. I am inclined therefore to think that in the case of such a publication as above supposed, not only might a jury reasonably find that it was a libel, but that if they did, the Court would think that the plaintiffs had satisfied the onus cast upon them to shew to the satisfaction of the Court that it was a libel.

Both Thesiger and Cotton L.JJ. in this case go further, and intimate an opinion that any publication so made that it would come to persons who had no concern at all with the defendants' proceedings, but who might possibly be interested, as customers of the bank, in considering whether the bank was in good credit, would have a tendency to injure the credit of the bank in the opinion of such persons. I have not been able quite to make up my mind on this, and prefer to point out that the question does not arise.

I think if the letter had been sent to only one person, and that person was one who was in the habit of sending many such

cheques to the defendants, it could not be said to be libellous. It was sent to a great many persons, who were in the habit of sending some, but very few, cheques to the plaintiffs, and the inconvenience which was occasioned to Messrs. Henty by having to keep such cheques till Saturday was so slight, that I cannot but view their conduct with moral disapprobation; but unless some good legal reason can be suggested for holding what they did actionable, the judgment should be affirmed.

One point more has to be considered. A publication calculated to convey an actionable imputation is primâ facie a libel, the law, as it is technically said, implying malice, or, as I should prefer to say, the law being that the person who so publishes is responsible for the natural consequences of his act. But if the occasion is such that there was either a duty, though, perhaps, only of imperfect obligation, or a right to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or I should prefer to say that he is not answerable for it, so long as he is acting in compliance with that duty or exercising that right; and the burthen of proof is on those who allege that he was not so acting. In this case, if any customer of Messrs. Henty who had been in the habit of remitting such cheques to Messrs. Henty and having them taken on account of his debts, had had such cheques returned to him, that customer would have had good reason to complain that this was done. If, therefore, Messrs. Henty had resolved to take no such cheques in future, there was a moral obligation on Messrs. Henty either to tell such a one that the cheques would not be taken in future, or when he brought them, to take them and warn him to bring no more; and the occasion was, I think, one that gave rise both to a duty to their customers, and a right in themselves to give the warning, and the occasion was privileged. But I think there was here evidence (I say no more) that Messrs. Henty did not send the circular because they had resolved to take no cheques, but resolved to take no cheques in order that they might send the circular. And if that was found by a jury to be the fact, I think they could not shelter themselves from the consequences of publishing the letter, if it was a libel, by an occasion which they sought. I think, therefore, that the only question is whether there was here evidence

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from which such facts could be found as, in the opinion of the Court, would satisfy the onus, which, I think, lies on the plaintiffs, to shew that this publication had a libellous tendency. And as I am of opinion that there was not, I think that the judgment should be affirmed.

LORD WATSON:—

My Lords, I am of opinion that the judgment of the Court of Appeal ought to be affirmed, and a very few words will suffice to explain the considerations which have ultimately led me to that conclusion.

I think it is quite possible that some of those persons, to whom Messrs. Henty's circular of the 2nd of December 1878 was sent, might suppose that its language was intended to convey to them a quiet hint that the affairs of the bank were not in an altogether satisfactory condition; that, however, is not the meaning of the words of the circular, upon any possible construction of them; it is an inference drawn by the reader from the fact notified in the circular, which does not per se constitute a libel. If I were satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of any person of average intelligence on reading the circular, I should hold that it had a libellous tendency, although the language used is not in itself libellous. But, besides the one injurious inference suggested by the appellants, there are many other inferences of an innocent character, which naturally might, and probably would, suggest themselves to any reader of the circular who was not induced to put a malignant construction upon it by some cause such as is not proved to have existed in the case of any one of the persons to whom it was sent.

I am accordingly of opinion that, whilst the language of the circular is, in the sense which I have indicated, capable of suggesting the injurious imputation of which they complain, the appellants have failed to prove facts and circumstances leading to the conclusion that it must have been so understood by those who received it, or in other words have failed to shew that it had a libellous tendency. And as I have been unable, after carefully considering the authorities bearing on the case, to differ from the

law as stated by the noble and learned Lord who has just delivered his opinion, it necessarily follows that, in my opinion, the judgment of the Court below is right.

LORD BRAMWELL :—

My Lords, in this case the plaintiffs have stated as their cause of action, a publication relating to them of the defendants to which they, the plaintiffs, have by innuendo attached a particular meaning, viz., that it imputed to them insolvency in their trade or business. They have proceeded to trial, and given no evidence in support of their innuendo, except such, if any, as is afforded by the publication itself. The Court of Appeal have dealt with the case as though there had been no innuendo, and the case had come before them on demurrer. They have held that the publication is no libel, and given judgment for the defendants.

I have no doubt that it was competent for the Court so to deal with the case. Whether they have come to a right conclusion in holding that the publication was no libel, may be a question ; but that they had jurisdiction and power so to decide there cannot be a doubt. They could not indeed hold that it was a libel, unless expressly referred to them by demurrer; but it is clear that they could hold that it was not a libel, either on demurrer, or formerly on motion in arrest of judgment, or on such a proceeding as that which brought the question before them : *Hearne* v. *Stowell* (1); *Goldstein* v. *Foss* (2). But though they had this power or jurisdiction, it is still for your Lordships to say whether they came to a right conclusion.

Now the publication, the alleged libel, is a notice sent by the defendants to their customers that they, the defendants, will not receive in payment cheques drawn on any of the branches of the plaintiffs' bank. I omit all mention of the innuendo, because, as I have said, no evidence was given in support of it beyond proof of the notice itself. But it is contended for the plaintiffs that the notice proves or shews that the defendants charged that the plaintiffs were insolvent, not to be relied on to meet the cheques drawn on them, and not to be trusted to cash the cheques drawn

(1) 12 A. & E. 719. (2) 6 B. & C. 154.

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on them by their customers. No doubt, if it means this, or if this is the proper inference, or the inference reasonably to be drawn from it, it is libellous; because it is admitted on all hands that the common expression "meaning" is incorrect and inadequate; for the question is not what the writer of an alleged libel means, but what is the meaning of the words he has used; and more than that, for the words themselves may be harmless, if a libellous inference may be drawn from them as a necessary or natural consequence they are libellous. I wish to avoid a definition or the laying down of a rule as much as possible, but I think that what I have said is correct, and that the question in this case is whether such inference is to be drawn here; for the words in themselves are perfectly harmless, they contain nothing of or about the plaintiffs, their character or conduct. All that the words say is, that the defendants will not take in payment cheques on them.

Now, as to insolvency, the words infer insolvency, or they do not. If not, there is no libel. If they infer insolvency, they infer that and nothing else, or they infer two or more of several things, of which insolvency is one; that is to say, that the defendants refuse the cheques for some reason, or reasons, of which insolvency may or may not be one. It seems to me impossible to say that they infer insolvency, and insolvency *only*. It is impossible to say that a person reading them, especially the customer to whom they were sent, might not infer that there had been a quarrel between the parties, that the plaintiffs charged a commission, or too large a commission, or would not discount the defendants' bills, or opened and shut their offices at inconvenient hours, or would not cash cheques on one branch at another, or fifty other reasons. I think, therefore, it cannot be inferred from the alleged libel that *only* insolvency of the plaintiffs is imputed, and that that, and nothing else, was the cause why the defendants refused to take in payment cheques on the plaintiffs' branches. If so, two questions remain for consideration; is insolvency one matter which may be inferred? If it, but many others, may be, is the publication libellous?

In the first place, to my mind no one ought to infer from the words an imputation or charge of insolvency. I say this with

hesitation, because I think that no one else has said so yet, though the case has been before, and in the hands of, so many most eminent lawyers thoroughly conversant with business; but if I had been left to my own unassisted and unbiassed judgment, I should have said it was clear that insolvency was not imputed. People do not refuse in payment cheques on a banker because the banker's solvency is doubtful. A man who privately knew that a banker could not pay a shilling in the pound would take a cheque on him, and be glad to get it. He would calculate that the banker would last for a few hours, and if he did not, at the worst, he, the taker of the cheque, would have recourse to the drawer. It is true, indeed, as suggested by the noble and learned Lord on the woolsack, that if the cheque was dishonoured the taker would have the trouble of giving notice; but I venture to say that such a matter is never taken into consideration; it is too recondite. It would not count as against the advantage of having an acknowledgment of the debt from the debtor so easily enforced as a cheque; saving all the trouble of proving the debt, and producing payment, unless the banker stopped before the cheque could be presented.

I confess I cannot but entertain this opinion very strongly, and though, for the reason I have given, I hesitate to express it, yet I must say it is strongly confirmed by what the Solicitor-General pointed out. No witness is called who received the circular, and who acted upon it as imputing insolvency. I do not say that any witness could have been properly asked what he inferred from the circular, but in reference to the damages he might have been asked if he drew his cash from the plaintiffs and did it because of the circular. No doubt a witness said he drew £5000 because he *heard* of the circular. Very likely; but he did not see what was in it, nor was he a recipient of it, nor therefore capable of judging of its purport, as a customer of the defendants would be. With all submission, I think his evidence was not admissible. Further, it is to be remembered that it is admitted that the defendants did not mean to impute insolvency. Fortified by these considerations, I cannot but think that the circular neither charged nor gave rise to the inference of insolvency, and that therefore the appeal should be dismissed.

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I have now dealt with two out of the three meanings or inferences which may be found in, or drawn from, the circular. I will suppose I am wrong in thinking no inference of insolvency can be drawn from the circular, and will now deal with the third, viz., that the inference to be drawn from the circular was that the defendants, for some reason or reasons, of which the insolvency of the plaintiffs *might* be one, would not take in payment cheques on the plaintiffs' branches. Is that actionable? I think not. The question seems to me one of entire novelty, strange as it may be that such a question should now arise for the first time. I cannot think that an action lies in such a case. I think that the defamer is he who, of many inferences, chooses a defamatory one. He should inquire what the truth is before judging. No doubt, he often will not, but what then? The risk of his not doing so is one we must run if we live among our fellow-creatures. I do not see how the world's affairs could be conducted if it were not so. Take this case for an example. The defendants had a perfect right to do the thing they did, viz., refuse to, or not, take cheques on the plaintiffs. I think, not only had they that right, but it was reasonable of them to do as they did, after the impertinent letter of Mr. Hooper. Had they not, they might at some future time have been told that they were under an obligation for a favour, a matter of grace, and been called on to return it. They had a right to tell their customers. If, when each customer came who brought a cheque on the plaintiffs, they had refused to take it, they would have done and said what they have done and said now, with this difference, that their customers would have had a right to complain that they were not warned beforehand. But if this circular is a libel they would have uttered an actionable slander, for an action will lie for *words* imputing insolvency to a trader. Their refusal of the cheque and giving their reasons would be *saying* what, as it is, they have *written*. What, then, were they do? If they had said they did not mean to impute insolvency, it would have been argued that that shewed that it was the natural inference from the letter. If they had said they had had a difference with the plaintiffs, the same remark might be made, or that that was not the reason. Besides, they were under no obligation to give a reason. Or it

might be argued that even if that were the reason, the legitimate inference, or an inference, was that the plaintiffs conducted their business in a bad or inconvenient way.

In short, it seems to me that the defendants had a right to do and say what they did and said; and if people will draw from their doings a possible, (for I am now assuming it possible,) inference of insolvency in the plaintiffs, it is no fault of the defendants. Take the case put of an invitation to dinner, and a refusal because A. was to be of the party. It might be inferred from that that the writer imputed that A. was not fit for society. But would it be actionable? Take the case which I put. The plaintiffs' manager is asked to take a glass of beer, and refuses, saying that he never drinks Henty's beer. A possible inference is that it is bad beer. Is it actionable? I have said that the defendants had a right to do and say what they did. By that I did not mean that they had any especial right. All the Queen's subjects have a right to refuse payment by cheques on the plaintiffs' bank, and to say so. I have; and I think that I should exercise that right if such a cheque were offered to me, not because I doubted their solvency, but because they might have a troublesome manager. But if I am wrong in giving this right to all the Queen's subjects, at least these particular defendants had it.

I say, then, that the words are harmless in themselves, and that they do not import or justify the inference of the plaintiffs' insolvency. If I am wrong in this, and if the words do impute or justify the inference of insolvency as a possible cause of the defendants' refusal to take cheques on the plaintiffs, I say that that is only one of several things which they import, or of which they justify the inference; that no action lies in such a case; that if it would lie against any one not interested to do and say what the defendants did and said, it does not lie against them who were so interested and did and said no more than they had a right to do. In this way the question of privilege arises in a sense. If they had such right, it seems to me that their motive is immaterial, and that they might do what they did, though out of anger or malice.

If I am wrong in the above, and if the inference, or an infer-

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Lord Bramwell.

ence, to be drawn from the words used is the imputation of insolvency to the plaintiffs, and if the action is otherwise maintainable, I think there is no defence on the ground of privilege. I think that that follows from the defendants' own contention. They say that they did not believe the plaintiffs to be insolvent, and had no intention to say so, and that if that is the inference to be drawn from their language, their language is wrong. But they have no privilege to use wrong language. They have only a right to say what they believe. It may be by mistake that they have said what they do not believe, but for that mistake they are liable. I am of opinion, however, that for the above reasons they are not liable, that the plaintiffs have no cause of action, and that the judgment should be affirmed.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 1st August 1882.

Solicitors for appellants: *Nash & Field, for Stuckey Son & Jennings, Brighton.*

Solicitors for respondents: *Robinson Preston & Stow, for Raper & Freeland, Chichester.*

[HOUSE OF LORDS.]

THE STOOMVAART MAATSCHAPPY NEDERLAND . . . . . } APPELLANTS;

AND

THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY . } RESPONDENTS.

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Ship—Collision — Limitation of Liability of Shipowner—Merchant Shipping Act 1862 (25 *&* 26 *Vict. c.* 63) *s.* 54.

Two ships *V.* and *K.* having come into collision, the owners of the *V.* brought an action in rem in the Admiralty Division against the owners of the *K.*, who counter-claimed, and both ships were held to blame. The owners of the *K.* brought an action in the Admiralty Division to limit their liability under the Merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63) s. 54, and paid the amount of their liability into Court. The damage to the *V.* was greater than that to the *K.*, and the fund in Court was not sufficient to satisfy all the claims for which the owners of the *K.* were answerable in damages:—

Held (Lord Bramwell doubting) that the owners of the *V.* were entitled to prove against the fund for a moiety of their damage, less a moiety of the damage sustained by the *K.*, and to be paid in respect of the balance due to them after such deduction, pari passu with the other claimants out of such fund.

Chapman v. *Royal Netherlands Steam Navigation Company* (4 P. D. 157) overruled.

APPEAL from an order of the Court of Appeal.

A collision having taken place between the steamship Voorwaarts owned by the appellants, and the steamship Khedive owned by the respondents, both ships were damaged.

An action in rem in the Admiralty Division having been brought by the owners of the Voorwaarts against the Khedive, the owners of the Khedive defended the action, and counter-claimed in respect of their own damage. Ultimately in this House both vessels were held to blame (1).

The owners of the Khedive then brought the present action in the Admiralty Division against the owners of the Voorwaarts, and all other persons claiming damages against the plaintiffs in

(1) 5 App. Cas. 876.

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respect of the collision, averring in their statement of claim that the amount of their limited liability, calculated at £8 per ton, was £28,560, and claiming that this sum should be apportioned between the owners of the Voorwaarts and the other persons who might establish their claims, rateably in proportion to the respective amounts of their losses; and further claiming that the action in rem against the Khedive might be stayed, except as regarded their own counter-claim, which they sought still to enforce.

The owners of the Voorwaarts in their statement of defence alleged that their damage was much larger than that sustained by the owners of the Khedive, and that they would not be paid in full; and submitted that the proceedings in the action in rem ought to continue till after the usual reference to the Registrar and merchants had been held, in order that such respective damages might be ascertained, it being the right of both parties under the judgment in that action that the damages arising out of the collision should be as far as possible equalized between them, each set of owners bearing or paying half the joint loss; that this equalization would be obtained, after ascertaining both damages, by ordering the owners of the Khedive to pay to the owners of the Voorwaarts the difference or balance between half their own damage and half the damage of the owners of the Voorwaarts; and that this balance was that for which the owners of the Khedive were actually liable, and would be the amount of the claim by the owners of the Voorwaarts against the owners of the Khedive in the present action; while the claim of the owners of the Khedive against the owners of the Voorwaarts would be thus wiped out. They also submitted that when the balance aforesaid had been ascertained, proceedings upon the counter-claim and upon the claim in the action in rem should be stayed (except as to costs), the owners of the Voorwaarts being admitted to prove for the balance, rateably with the other claimants, against the fund representing the limit of the liability of the owners of the Khedive.

The owners of the Khedive admitted that their own damage was less than that sustained by the owners of the Voorwaarts, and that the £28,560 was not sufficient to satisfy in full the claims for which they were answerable in damages.

Sir R. J. Phillimore on the trial of the present action, holding himself bound by *Chapman* v. *Royal Netherlands Steam Navigation Company* (1), pronounced by a judgment dated the 5th of April 1881 that the owners of the Khedive were entitled to limited liability according to the Merchant Shipping Act 1854 and the Merchant Shipping Amendment Act 1862, and were answerable in damages to an amount not exceeding £28,560 (being the aggregate amount of £8 per ton); and ordered that upon payment into Court of that sum with interest all proceedings in the action in rem should be stayed, except so far as regarded proceedings by the defendants in that action (the owners of the Khedive) for the enforcement of the judgment or decree obtained by them on their counter-claim; and further ordered that that sum and interest should be divided rateably among the several persons who should establish their claims to share therein; with a reference of all claims to the Registrar, assisted by merchants, to assess the amounts; and condemned the owners of the Khedive in the costs of the present action.

This judgment was on appeal confirmed by the Court of Appeal (Jessel M.R. Baggallay and Lush L.JJ.), on the authority of *Chapman* v. *Royal Netherlands Steam Navigation Company* (1), and without expressing any opinion.

From this decision the present appeal was brought.

June 2, 5. Sir *F. Herschell* S.G. and *Webster* Q.C. (*Phillimore* with them) for the appellants:—

The decision in *Chapman* v. *Royal Netherlands Steam Navigation Company* (1) was wrong and is not supported by authority or principle. Before the Judicature Acts, when both ships were to blame each brought an action against the other and there was no counter-claim. In consequence of *The Seringapatam* (2) 24 Vict. c. 10 s. 34 enacted that causes might be heard together. Since the Judicature Acts, when there are cross-claims the judgment is for the balance only: Order XIX. rule 3: Order XXII. rule 10. Each owner is liable for half the total loss; the only payment being by the one who has to pay the balance to the other: *The Wood-*

(1) 4 P. D. 157. (2) 3 Wm. Rob. 38.

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rop (1); *Hay* v. *Le Neve* (2); *The Ettrick* (3); *De Vaux* v. *Salvador* (4). In practice there was but one monition. If the respondents prevail they will be paid their damages in full; while the appellants must prove for theirs, and receive only a dividend. Under such a rule, when both ships are equally damaged the owner whose liability is limited would put money into his pocket, though the Merchant Shipping Acts (17 & 18 Vict. c. 104 and 25 & 26 Vict. c. 63 s. 54) intended only to limit the liability.

Butt Q.C. and *Benjamin* Q.C. (*Myburgh* Q.C. with them) for the respondents:—

Chapman v. *Royal Netherlands Steam Navigation Company* (5) was rightly decided. The Act of 1862 (25 & 26 Vict. c. 63 s. 54) limits the damages but does not otherwise affect the liability. When the owner has paid into Court his £8 per ton he is as if he had paid in full, and his cross-claim is not affected. Of necessity there must often be more than one monition: e.g. where a shipowner sues for himself and for owners of cargo, or for the crew who have lost their clothes &c. And where cargo owners have to contribute to salvage there can be no set-off between the ships. The old practice in the Admiralty was not as stated by the appellants. No instance can be found of a monition, but in cross-suits there were always two decrees by the Court and two reports by the Registrar: *The General Havelock* and *The Wilhelm* in 1864; *The Atalanta* and *The Lumley Castle* in 1875; and since the Judicature Acts, *The Lady Mostyn and The R. L. Alston*; and *The Seaham Harbour and The Harraton*, both in 1882; (not reported but cited from documents supplied by the Registrar of the Admiralty Division). The practice before the Merchant Shipping Act of 1862 is shewn by *The Calypso* (6); *The North American* and *The Tecla Carmen* (7); and *The Milan* (8). The object of the limitation action was to stop the action in rem and prevent final judgment (see 17 & 18 Vict. c. 104 ss. 504, 514). The respondents' contention gives an equal dividend to the owners of ship and cargo

(1) 2 Dod. 85.
(2) 2 Shaw App. Cas. 400.
(3) 6 P. D. 127.
(4) 4 A. & E. 420, 431.
(5) 4 P. D. 157.
(6) Swab. 28.
(7) Lush. 79.
(8) Lush. 388.

respectively. The appellants' contention gives an unequal: e.g. if the Khedive were not damaged the owner of the cargo on the Voorwaarts might get less than he would if the Khedive were damaged, because the damage to the Khedive if any would have to be deducted from the damage to the Voorwaarts, which would leave a larger dividend for the owner of the cargo on the Voorwaarts. In the present case the Khedive need not have counterclaimed, but might have paid the limited amount into Court and petitioned for limitation. Afterwards the Khedive might have brought an action for her loss. There must then have been two monitions; and so if the two ships had been towed into ports in different countries and one suit brought in each country.

Sir *F. Herschell* S.G. in reply referred to *The Washington* (1) in 1841–2.

The House took time for consideration.

July 26. LORD SELBORNE L.C.:—

My Lords, this case has been to me one of unusual difficulty. In the Courts below, in the case of *Chapman* v. *Royal Netherlands Steam Navigation Company* (2), judicial opinion has been equally divided, the Master of the Rolls and Brett L.J. (a judge of great experience in maritime cases) taking the view for which the appellants contend, and Baggallay and Cotton L.JJ. being in the respondents' favour. I fear that, even in your Lordships' House, there is not unanimity. In most cases the argument from abstract justice and equity is (in re dubiâ) of great importance; but here it seems to me that there is little, if any, room for that argument. Whatever in this case was the liability to damages within the meaning of the Merchant Shipping Amendment Act of 1862, to that liability the statutory limitation must be applied. That liability depends upon a rule of the Admiralty jurisdiction, which to myself has always seemed arbitrary; and, in examining the practice and procedure of the Court of Admiralty in order to ascertain the true results of that rule, we not only enter upon a branch of forensic jurisprudence the forms of which are different from those of the

(1) 5 Jur. 1067. (2) 4 P. D. 157.

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Common Law Courts (in which other questions of liability to damages usually arose), but we find important variations in those forms themselves.

The rule was thus stated by Sir William Scott in the case of *The Lord Melville* (1):—"When it (i.e. a loss by collision at sea) happened by the common fault of both parties, the ancient rule of the Admiralty was, that it should be considered a common loss, to which both parties were liable." In the case of *The Woodrop* (2), the same very learned Judge said, "The rule is that the loss must be apportioned" (meaning, *equally* apportioned) "between them, as having been occasioned by the fault of both of them."

The Merchant Shipping Amendment Act of 1862 provides that in all cases of collision, where there is no loss of life or personal injury, (no special reference being made in the Act to the particular case of both ships being in fault,) the owners of any ship "shall not be answerable in damages in respect of loss or damage to ships, goods, merchandise, or other things," to an aggregate amount exceeding £8 for each ton of the ship's tonnage. This is a limitation of the amount for which the owner shall be "answerable in damages;" it does not make him, in any case, "answerable in damages" upon any principle, or to any extent, upon or to which he would not have been so "answerable" if the Act had not passed. Nor does it relieve him wholly or partially from any loss to which he might have been subject, otherwise than by liability in damages. If, for instance, his own ship were wholly lost in a collision, for which it was alone to blame, he must bear that whole loss, in addition to his liability in damages (as limited by the statute) to the owners of the other ship, and also to the owners of any cargo. And, if the true result of the Admiralty rule is (as the Master of the Rolls and Brett L.J. considered it to be) that, in a case in which both ships are to blame, only one of them is really liable in damages to the other, (such damages representing a moiety of the difference of the aggregate loss, beyond the point at which the one loss balances the other,) the fact, that the rest of the loss must be borne by each shipowner who has suffered it, is quite consistent with the limitation of liability by the Merchant Shipping Amendment Act.

(1) 2 Shaw. Sc. App. 402. (2) 2 Dod. 85.

The question is whether there are, in these cases, two cross liabilities in damages, of each shipowner to the other for half the loss which that other has sustained, or only one liability, for a moiety of the difference of the aggregate loss beyond the point of equality. If both parties were solvent, and if there were no statutory limit of liability, the result, either way, would practically be the same; because, up to the point of equality, the loss would be borne (in the one view) by the owner who suffered it, and (in the other view) the one liability would be compensated by, or set off against the other, according to an equity which would certainly have been enforced in the Court of Admiralty. If, however, by the effect of a supervening bankruptcy before judgment or of the statutory limitation of liability, the position of the two parties were rendered unequal, so that a claim by the one would only be to receive a dividend out of a fund, while a claim by the other would be payable in full, the distinction may become important. But a consequence arising out of circumstances foreign to the rule itself ought not to be regarded in the determination of this question, whether it may tend, practically, to disturb or to maintain that equality of participation in the loss arising from a common fault, which is the principle of the Admiralty rule.

The solution of this question appears to me to depend upon the true effect of the procedure, and the forms of decrees, of the Admiralty Court, in this class of cases; for the new method of procedure under the Judicature Acts, by claim and counter-claim, cannot, in my opinion, make any difference. If the course of the Court had been to deal with the whole controversy between the owners of the two ships in a single proceeding, the natural result of the rule would, I think, certainly be that for which the appellants contend. If both ships had suffered an exactly equal amount of damage, ascertained in the same suit, it cannot be conceived that the Court, acting on such a rule, would adjudge the owner of the one ship to pay any damages at all to the other. In general, this would not happen, but one ship would have suffered more damage than the other. The natural result of this inequality of loss would seem to be, not that either owner should pay anything to the other up to the point at which (if there had

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been no such difference) the loss would have been equal, but that the difference only should be equally divided between them, the one bearing and the other paying a moiety of that difference.

The whole difficulty (as it seems to me) arises out of the fact that the course of the Court of Admiralty was not (and, from the nature of the case, hardly could have been) to deal with the whole controversy between the owners of the two ships in a single suit. When a suit for collision was brought, it was always by one party, alleging the other party to be in fault; and there was also generally (when both were ultimately found to blame, and when both had sustained damage) a cross suit by the other party, with a like allegation of fault against his opponent. At the hearing, whether of one such suit only, or of two such suits, heard separately, or conjoined, the Court, when it determined that both ships were to blame, usually pronounced in each suit a separate decree. It cannot be denied that the more common and recent form of such decrees seems (primâ facie, at all events) favourable to the contention of the respondents. In each suit there was (as I have said) a separate decree, declaring that both ships were in fault; "and that the damage arising therefrom ought to be borne equally" by the owners of both ships; and afterwards proceeding to "condemn" the defendants and their bail in a moiety of the damages proceeded for by the plaintiffs;" and referring it to the Registrar, assisted by merchants, to assess the amount of such damages (with or without costs, as the Court might think fit). Under every such decree, the Registrar made a report, finding that a moiety of the damages sustained by the plaintiffs amounted to so much, and (ordinarily) computing interest thereon from the date of the decree. A moiety of the damages sustained by the other party (if plaintiff in a cross suit) was in like manner found (also with interest) sometimes by the same, and sometimes by a separate report. It does not appear that, on the face of the reports made under this form of decree, any balance was ever struck; but, unless the parties, by a voluntary settlement, rendered further resort to the Court unnecessary, the proper course would have been for that plaintiff, to whom a balance was due, to apply to the Court for a monition requiring the other party to pay it. A monition was seldom issued in practice; indeed, Mr. Butt, in

his argument for the respondents, stated that he had been unable to find one on the records of the Court. But there cannot, I think, be any doubt, that, if issued, it would have been in favour of one plaintiff only and that for the balance representing one moiety of the excess of the aggregate loss beyond equality, and the interest thereon, and the costs (if any) to which that plaintiff might be entitled.

The computation of interest by the registrars, in cases of this class, might, at first sight, seem to imply that there was, in that stage, an ascertained judgment debt, carrying interest. But I think this cannot be a correct view, whatever (in other respects) may be the effect of the decrees under which the Registrars acted. It does not appear to have been the general course of the Court that those decrees should contain any direction as to interest; and I think it more probable that the principle on which interest was computed under them is that mentioned by Mr. Sedgwick in his book on Damages (chapter 15, pp. 373 and 385–7), where he treats of the power of a jury to allow interest, as in the nature of damages, for the detention of money or property improperly withheld, or to punish negligent, tortious, or fraudulent conduct; the destruction of or injury to property involving the loss of any profit which might have been made by its use or employment.

I understand the Master of the Rolls and Brett L.J. to have been of opinion that everything in this course of procedure, prior to monition, was, not in form only (according to the style of the Admiralty Courts), but substantially, interlocutory; that the decree was not, either before or after the report of the Registrar, equivalent to a final judgment, constituting a liability in a certain amount of liquidated damages; that, for this purpose, a monition (which, both in form and in substance would be an order to pay) was necessary; that such monition could only issue for a moiety of the excess of the aggregate loss beyond the point of equality, in conformity with the principle of the rule, declared on the face of the decree itself; and that there was therefore no liability in damages, except for that balance. Baggallay and Cotton L.JJ. on the other hand thought, that the amount of the liability of each party to pay damages to the other was fixed by the decree

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in the suit of each plaintiff, and that the monition was merely a step towards execution.

If no light could be obtained from any other source than the analogy of the forms of procedure in Courts of Common Law and Equity, I should have found great difficulty in dissenting from the conclusions of Baggallay and Cotton L.JJ. But in determining the effect of Admiralty procedure, authorities in the Admiralty Courts ought to prevail over reasoning founded upon the procedure of other tribunals.

I referred in the outset to the terms in which the "ancient rule of the Admiralty" was stated by Sir W. Scott in the case of *The Lord Melville* (1); and I recur to them for the purpose of observing, that they would hardly seem to be quite accurate if the loss to be "apportioned" (according to the other form of expression used by him) were only that of one ship considered separately, and without regard to the loss of the other. At all events the phrase "a common loss" seems to me to point more naturally to what Lord Denman understood to be the result of the Admiralty rule. "A positive rule" (he said in *De Vaux* v. *Salvador* (2)) "of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two." The observation which I have ventured to make upon Sir W. Scott's words is, in itself, slight, and would be of no weight at all, if there were no precedents of the Court of Admiralty in accordance with Lord Denman's statement of the rule. But there do appear to be such precedents, older than the forms recently in use, and differing from them. Whatever else may be doubtful in this case, it is, at all events, certain that the ancient rule of the Admiralty and the present rule are the same.

The earliest recorded precedent is that of *The Petersfield and The Judith Randolph* (3), decided by Sir James Marriott in 1789 (following, as it would seem, a case determined in Queen Anne's time), which was treated by Lord Gifford, when delivering the opinion of this House in *Hay* v. *Le Neve* (15th June, 1824) (3) as an authority for the application of the Admiralty rule, which

(1) 2 Shaw Sc. App. 402. (2) 4 A. & E. 431.
(3) 2 Shaw Sc. App. 403.

the House of Lords ought to follow. In *Hay* v. *Le Neve* (1) the question, which is now so important, did not arise, because there only one of the ships which came into collision had sustained any damage. But a decision so recognised by this House is entitled to great weight, on all points relating either to the principle or to the application of the rule.

The exact terms of the final judgment entered up in *The Petersfield and The Judith Randolph* (2) were thus stated to the House of Lords by Lord Gifford: "The judge by his interlocutory decree pronounced that both ships were in fault, and that the Judith Randolph was most in fault, and decreed that the whole damage sustained by the owners of the ship Petersfield and her cargo which was sunk and lost, as well as the £230 damages and expenses given against the ship Petersfield and the costs of suit here on both sides, be borne equally by the parties in this suit, and assigned for liquidation of damages and taxation of expenses the third session of next term; and referred the liquidation of the said damages and expenses to the Registrar, taking to his assistance two merchants." This form of decree agrees with Lord Denman's statement of the rule. Its effect is, I think, clear. £230 damages and expenses had been ascertained (I presume in a suit brought by the owners of the Judith Randolph) as the amount of the loss and expenses suffered by the Judith Randolph, in a moiety of which (as I suppose) the Petersfield had been "condemned." But the amount of the loss and expenses suffered by the Petersfield was, as yet, unascertained. Let it be supposed (for illustration's sake) that, when ascertained, the loss and expenses suffered by the Petersfield and her cargo might amount to £1770, which, added to £230, would make £2000. This decree certainly could not and did not mean, that the owners of the Petersfield and her cargo, who had suffered in damages and expenses £1770, should be liable in £1000 damages and costs to the owners of the Judith Randolph (whose total loss and expenses did not exceed £230), and should themselves be entitled to receive back from the owners of the Judith Randolph the exact amount which they so paid. The effect of that operation would simply be that the parties would be left in the same position as they

(1) 2 Shaw Sc. App. 395. (2) 2 Shaw Sc. App. 404.

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would have been at common law, each bearing his own total loss. The effect of such a form of decree could, therefore, only be, that the owners of the Petersfield and her cargo should bear their own greater loss to the extent of £1000, and that the owners of the Judith Randolph, after bearing the whole amount of their smaller loss (viz., £230), should pay £770 (being a moiety of £1540, the difference of the aggregate loss) to the owners of the *Petersfield*. This is in substance, that mode of applying the Admiralty rule, for which the appellants here contend.

Dr. Lushington appears to have followed this precedent in 1841 (referring expressly to *Hay* v. *Le Neve*) (1) in the case of *The Washington and The Catherine* (2), when (two cross actions being tried by agreement at the same time) "he decreed the damages, costs, and expenses of both parties to be thrown together, and to be equally divided."

It further appears to me, that this view of the real meaning of the procedure in such cases goes far to reconcile with sound principle the course taken by Dr. Lushington in *The Seringapatam* (1848) (3) and *The Tecla Carmen* (1859) (4); which (in the former case especially) would otherwise have seemed arbitrary, and hardly consistent with the respect due to those decrees of Her Majesty in Council in favour of the owners of the Harriet and the Tecla Carmen, the fruits of which he thought himself entitled to withhold from the plaintiffs, unless (in the one case) they would "submit to the deduction of a moiety of the damages which had been sustained by the owners of the Seringapatam" (without a decree in any cross suit), and (in the other) until a cross suit should be brought to hearing.

These authorities are, I think, sufficient to prove that the course of the Court of Admiralty has been to use its powers over its own procedure, so as, either at the hearing of a cross suit after decree and report in the original suit, or at the hearing of two conjoined suits, or in that later stage at which a monition might be applied for, to bring about the same result as if the whole controversy between the owners of the two ships had been, from the first, dealt with in one proceeding; and this, not by way of

(1) 2 Shaw Sc. App. 395.
(2) 5 Jur. 1067.
(3) 3 W. Rob. 38, 44.
(4) Lush. 79.

set-off, but in a manner which can only be explained as resulting from the view which that Court took of the principle, and the just consequences, of its own rule.

One further observation I desire to make, as offering (what seems to me) a not improbable explanation of the ordinary form of decree. It is that, as every suit of this kind was originally brought by a plaintiff alleging his adversary to be in fault (and not admitting the existence of fault on both sides), and as each suit was or might be separately brought to a hearing, the form of the decree made separately in each suit, before "liquidation of damages," would naturally be such as might be applicable to the possible case (which actually occurred in *Hay* v. *Le Neve* (1)) of that plaintiff's ship only having suffered any damage; in which case the moiety of that damage only which was mentioned in that decree would be taken into account.

My conclusion, upon the whole, is that the opinion of the Master of the Rolls and Brett L.J. ought to prevail, and that the judgment appealed from should be reversed. In so saying I am bound to acknowledge that my impression, down to the conclusion of the arguments, had been different. A fuller consideration of the authorities to which I have referred, has convinced me that they are not reconcilable with the judgment of the Court of Appeal.

LORD BLACKBURN:—

My Lords, in this case two ships, the Voorwaarts belonging to the appellants, and the Khedive belonging to the respondents, came into collision, and damage was thereby occasioned to each of the ships and to the cargo on board; so that the owners of each ship, and the owners of the cargo, each sustained loss arising from the same accident, and each had a claim for recompense from those who were responsible. No loss of life or personal injury was incurred. It was ultimately determined that the collision arose from the fault of both ships. And, according to the rule in the Admiralty, that being so, the whole damage arising from the collision ought to be borne equally by the owners of the two

(1) 2 Shaw Sc. App. 395.

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ships, without inquiring in what degree each was to blame. There was no fault or privity on the part of the owners of the Khedive and they were entitled to take steps for limiting their liability; and as the moiety of the damage in any view of the case exceeded the amount to which their liability was limited, they instituted an action for this purpose in the Admiralty Division, bringing that amount into Court, and making the owners of the Voorwaarts and all other persons claiming damages from the collision, defendants.

The amount of the damage to the Voorwaarts exceeded the amount of the damage to the Khedive; and the question which it is intended to raise is, whether the owners of the Voorwaarts were to prove for the whole moiety of the loss and damage sustained by them, and to be paid in respect of such moiety pari passu with the other claimants on the fund, which is the contention of the respondents; or whether the owners of the Voorwaarts were to prove for the moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the Khedive.

One practical difference is that if the respondents are right, the amount to be paid out of the fund in Court to the owners of the cargo, who are not to blame, will be diminished, for the benefit of the Khedive, who are to blame, and as was said by Baggallay L.J. in *Chapman* v. *Royal Netherlands Steam Navigation Company* (1) "it certainly strikes one as improbable that such an apparently inequitable result should be in accordance with a true construction of the Merchant Shipping Acts; but if such be their true construction we are bound to adopt and act upon it, however inequitable in our opinion the result may be." Perhaps it is too strong to call the result inequitable; but I think it is certainly one which the Legislature were not likely to have wished to bring about, and that, if they had had it brought to their notice, they probably might have altered the language of the Acts so as to make it clear that they did not intend to bring about such a result. Whether, on the true construction of the Acts as they are framed, the result follows, is the question.

Another result is that, as between the shipowners, the ship which seeks to limit its liability, will always, whether its damage

(1) 4 P. D. 170.

be greater or less than the other, obtain a benefit: whether that is to be wished depends on which was most to blame.

The question which it is meant to raise was decided in a case reported under the name of *Chapman* v. *Royal Netherlands Steam Navigation Company* (1). The Courts below treating that decision as binding on them, as it was, gave judgment in accordance with it, in order that the case might be taken into this House, where that decision, though an authority, is not binding. So that this is in substance an appeal from that decision, and was so argued. In that case the Savernake and the Vesuvius had come into collision, and both were to blame. The owner of the Savernake brought the amount of his statutable liability into Court, and made the Royal Netherlands Steam Navigation Company, who were owners of the Vesuvius, and all other claimants, defendants. The Master of the Rolls in that suit declared "that the defendants, the Royal Netherlands Steam Navigation Company, are entitled to prove for the moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the Savernake and to be paid in respect of such balance pari passu with the other claimants out of the fund in Court." That is the declaration which the appellants say ought to be made here, and if it were made the rest of the order would easily be framed. But this declaration was altered in the Court of Appeal by a majority, consisting of Baggallay, and Cotton L.JJ.; Brett L.J. dissenting, and thinking the declaration of the Master of the Rolls was right. So that, as far as mere weight of authority goes, it was pretty equal, Baggallay and Cotton L.JJ. being on one side, and the Master of the Rolls and Brett L.J. on the other. And when the argument at your Lordships' Bar was concluded, I think some of your Lordships were inclined to think that the one side was right, and some to think that the other was. I need hardly say that the question is one of difficulty.

On the best consideration I can give, having carefully considered the arguments at the Bar, and made some search for myself, and having read the judgments in *Chapman* v. *Royal Netherlands Steam Navigation Company* (1) and with especial care those from which I differ, I think that the Master of the Rolls and Brett L.J.

(1) 4 P. D. 157.

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were right. This is subject to what may be said by such of your Lordships as may entertain the opposite opinion. Some considerations may occur to them which have not occurred to me, and which may convince me that I should change my opinion.

The solution of the question before the House depends upon two questions: 1. What is the true construction of the statutes putting a limit on the liability of shipowners to make recompense in damages to those injured by a collision, brought about in whole or in part by the negligence of their servants? 2. What is the nature of the recompense, in damages, awarded by the rule of the Admiralty between the owners of the two ships which come in collision when both ships are to blame? I will first consider the statutes.

The first Act which limited the liability of shipowners in cases of collision was 53 Geo. 3 c. 159, and though that Act has been repealed by 17 & 18 Vict. c. 120, s. 4, I think its provisions are material in construing those provisions which have been by 17 & 18 Vict. c. 104, as amended by 25 & 26 Vict. c. 63, substituted for those of 53 Geo. 3 c. 159. Statute 53 Geo. 3 c. 159, begins by a recital that it was expedient to prevent any discouragement, to merchants and others, from being interested in shipping belonging to this realm; and it was confined to British ships. Sect. 1 enacts, "That no person, owner or part owner, of any ship shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted or occasioned, without the fault or privity of such owner, which may happen" to the cargo of the ship "or to any other vessel," or to any goods being in or on board any other vessel, "further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution or contracted for at the time of the happening of such loss or damage."

There were three cases decided between the passing of this statute and its repeal, which were not cited on the argument, but which I think it right to bring before your Lordships' notice.

In 1818, in *Wilson* v. *Dickson* (1), the Court of King's Bench

(1) 2 B. & Ald. 2, 15.

decided that the value of the ship was to be taken as "the existing value at the time when the loss takes place."

In *Brown* v. *Wilkinson* (1), in 1846, Parke B. intimates a strong opinion that the value, if it was res integra, ought to be taken as the value at the time of the commencement of the voyage, but adds, "As, however, the point has been decided by the case referred to, we should pause before we overruled that authority. It is not, however, necessary in this case to do so; for we think that, according to the true meaning of that decision, the value at the time of loss, to which the damages were there restrained, is the value at the moment the loss commences by the collision, whence the injury; and it is not to be reduced by the consideration that the defendant's vessel is about to founder, at which time it is really of no value; for that would be to exempt the defendants altogether, which the statute certainly does not contemplate under any circumstances." This was quite sufficient to suggest the expediency of substituting a fixed rule for ascertaining the amount of the limit of liability, as was afterwards done, though not till 1862, by 25 & 26 Vict. c. 63, s. 54.

In the interval between these two cases that of *The Dundee* (2), was decided by Lord Stowell in 1823. That was a case of collision, in which the *Dundee* was solely to blame, and consequently her owners were liable for the whole loss. The question there raised was as to what was to be included in the word "appurtenances" in 53 Geo. 3 c. 159, a question no longer of importance since the repeal of that statute. On a prohibition in *Gale* v. *Laurie* (3), the King's Bench, including Lord Tenterden, put the same construction on the words as Lord Stowell had done, so that the point, if still important, would probably be held concluded by authority. But the judgment of Lord Stowell contains a great deal very material to the present inquiry.

I will now read the part of Lord Stowell's judgment which I think important, though part of it is more relevant to the second question which I propose to discuss, than to the construction of the statutes. He begins by saying that the loss arose from "a

(1) 15 M. & W. 398. (2) 1 Hagg. Adm. 120.
(3) 5 B. & C. 156.

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want of that attention and vigilance which is due to the security of other vessels that are navigating on the same seas; and which if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages. The quantum of reparation due in such cases has been differently measured in the maritime laws of different commercial countries, and of the same country, amongst others our own, at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship, upon the common principle applying to persons undertaking the conveyance of goods" (I should rather say undertaking the management of anything likely to do mischief, unless attention and vigilance is used by those who manage it) "that they were answerable for the conduct of the persons whom they employed and of whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed; and it is not to be denied that the term 'compensation' is not very accurately applied to any restitution that falls short of a fair and full indemnification for the injury done. But Holland having introduced a law for the protection of its navigation, that persons interested in it should not be liable beyond the value of that property of their own which they exposed to hazard,—their ship, freight, apparel, and furniture,—England followed in successive statutes by which it protected owners from responsibility beyond those interests; first in the case of embezzlements committed by some of the crew of the ship herself, 7 Geo. 2 c. 15; and in a succeeding statute, 26 Geo. 3 c. 86, this protection was extended to the case of embezzlements committed by other persons. The Legislature proceeded in a later statute, 53 Geo. 3 c. 159, to give the same protection in the case of all losses otherwise produced. The latter statute, which most immediately applies to the present question, in the first enacting clause, subjects the ship, tackle, apparel and furniture, and its freight, but in the following clauses, particularly in the seventh and eighth, the word 'appurtenances' is introduced and is repeated as subject to contribution." He then discusses the nature of the fishing stores on a Greenland

voyage, and the case of *Hoskins* v. *Pickergill* (1), in which it was held that fishing stores were not included in the word "furniture" in the construction of a policy of insurance; and proceeds, "I am not sufficiently aware whether this would govern the construction of the same word occurring in an Act of Parliament, or in the phraseology of a Court, in which its meaning is perhaps more to be collected from its proper and genuine import, than from a prevailing understanding controlling its proper meaning in a contract between two individuals, whose words were not to be carried beyond their own intentions in the contract. But it is unnecessary for me to pursue that question further, because it is an admitted fact, that this mode of initiating a suit by arrest of ship, tackle, apparel, and furniture, is the ancient formula of the Court, though leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted than as the statutes restricted it. But the initiatory terms, tackle, apparel, and furniture, founded the suit sufficiently to enable it to embrace all the objects which the statutes left subject to its operation. These restrained them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms, and they must now go as far as the general law, limited only by that statute, extends."

Before going further I may observe first, that neither in *Wilson* v. *Dickson* (2), *The Dundee* (3), nor in *Brown* v. *Wilkinson* (4), did any question arise as to how a Court of Equity was to work the jurisdiction given it in cases where there were several losses to several parties arising out of the same collision, and the fund brought into Court was to be distributed amongst them rateably, which is the present case. In each of these cases there was one loss only. Next, that Lord Stowell treats it as quite clear that though the mode in which the Court of Admiralty founded its jurisdiction was by a seizure of the ship, the recompense in damages decreed by

(1) Cited from Park on Insurance, p. 97, 7th ed.; Marshall on Insurance, p. 735, 3rd ed.

(2) 2 B. & Ald. 2.

(3) 1 Hagg. Adm. 120.

(4) 15 M. & W. 398.

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that Court could be enforced against the owners out of all their property of every kind, so that the result was that by the general law the owners might be made to pay to their uttermost farthing the recompense in damages decreed by the Court of Admiralty, however small the value of their ship, when seized, was. Parke B. in *Brown* v. *Wilkinson* (1) says: "From the practice of the Court of Admiralty no light could be derived on this question, for that Court proceeds in rem, and can only obtain jurisdiction by seizure, and the value when seized is the measure of liability." It is not, I think, necessary to decide between those very high authorities. If it were I should wish to make further search amongst the cases on prohibition, but primâ facie one would say Lord Stowell was more familiar with the subject, and therefore more likely to be accurate. And lastly that Lord Stowell seems to me to think that the recompense in damages was to be regulated according to the established law in the Court of Admiralty, which is my own opinion. What that established law is, is a question which I will discuss hereafter.

Where there were several losses occasioned to several persons by one act of negligence of those for whom the owner was responsible, the 53 Geo. 3 c. 159 s. 7 permitted the owner to file a bill "in any Court of Equity having competent jurisdiction against all the persons who shall have brought any such actions, &c., and all other persons who shall claim to be entitled to any recompense for any loss or damage arising or happening by the same separate and distinct accident, act, neglect, or default, or on the same occasion, to ascertain the amount of" the value, "and for payment or distribution thereof rateably amongst the several persons claiming recompense as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompense according to the rules of equity, and as the case may require." There are carefully drawn provisions requiring the plaintiffs in such a bill to make all persons whom he knows of, as having any claim for recompense arising out of that one transaction, defendants, so that they may if they please claim; and by sect. 10 it is enacted that the Court in which the bill is filed shall have full powers for ascertaining the value and the amount of

(1) 15 M. & W. 398.

the losses or damages claimed by the defendants respectively, and "generally to do what may appear to be just" in such suit.

By 17 & 18 Vict. c. 120 s. 4, this statute was repealed; other enactments having been provided in the ninth part of 17 & 18 Vict. c. 104. Sects. 504 and 505 of 17 & 18 Vict. c. 104 were repealed by 25 & 26 Vict. c. 63 s. 2, and for these was substituted sect. 54 of that latter Act. It is in these words: "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say, 1. Where any loss of life or personal injury is caused to any person being carried in such ship; 2. Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; 3. Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; 4. Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat,—be answerable in damages in respect of loss of life or personal injury either alone or together with loss or damage to ships, boats, goods, merchandise, or other things to an aggregate amount exceeding £15 for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage."

The case which we have to deal with falls within the fourth of these heads. And, as I think, in respect of such losses the only difference intended to be made from the law as it was under 53 Geo. 3, c. 159, was to extend the protection to foreign ships as well as British, and to substitute as the limit of liability a fixed and easily ascertainable sum for the value of the ship, freight and appurtenances.

As regards the mode in which the limitation of liability was to be worked out where there were more persons than one who had sustained loss from the same separate neglect, or on the same occasion, the elaborate provisions of 53 Geo. 3 c. 159 were repealed,

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and in lieu of them was substituted s. 514 of 17 & 18 Vict. c. 104, which I think was intended to give the jurisdiction to any Court of Equity in any part of the British dominions and in Scotland to the Court of Session, but to make no other difference in the substance of the law. And I think, though the words are changed, principally I think with a view to brevity even at the risk of obscurity, they ought to be construed with reference to the former law, and the extent to which it was intended to alter it. And, doing so, it seems to me that the phrase "be answerable in damages" is not to be confined to the damages to be recovered or enforced in an action directly brought against the owner, but is to be construed as meaning that the aggregate of the recompenses which he has to distribute under s. 7 of 53 Geo. 3 c. 159, "according to the rules of equity and as the case may require" shall be so limited. This is an important link in my chain of reasoning. I think that the principle laid down in *Rex* v. *Loxdale* (1) as to the construction of statutes in pari materiâ applies; if I am wrong in this, so much of what I rely on is "debile fundamentum," and I agree that so far "fallit opus." If I am right, I cannot but think that if Baggallay and Cotton L.JJ. had had their attention called to the very wide words of s. 7 and s. 10 of 53 Geo. 3 c. 159, giving the Court of Equity, whose powers the Master of the Rolls was exercising, every power for distribution of the value amongst the several persons entitled to such recompenses, and "generally to do therein as shall appear to be just," and had agreed with me in thinking that, though these words are not repeated in 17 & 18 Vict. c. 104, s. 514, the previous law is to be borne in mind when construing that section, their opinions might have been different; at least Baggallay L.J. would have more fully developed his reasons for thinking that the true construction of the Act compelled him to put a construction on it which he, in the passage already cited, calls "apparently inequitable in its result." And Cotton L.J. would have given his reasons for saying, as he does (4 P. D. 186), that the result the Master of the Rolls had come to was "apparently against the words and meaning of the Merchant Shipping Acts."

But the argument at your Lordships' bar was mainly rested on

(1) 1 Burr. 447.

the effect of the rule in Admiralty in the Court of Admiralty, and the proceedings in the Court of Admiralty before there was any limitation of liability at all.

That Court has jurisdiction over both the parties to a collision. Either of them may, if he pleases, abandon or not exercise his right to claim a recompense from the other. But when one does institute a suit the other cannot baffle him by refusing to appear; even though his ship is not within the reach of the Court, the institution of the suit gives a maritime lien against the ship, forming the foundation of an inchoate right to seize the vessel whenever it comes within the reach of the Court, even though in the meantime it had become the property of a bonâ fide purchaser without notice: *The Bold Buccleugh* (1). And according to Lord Stowell in *The Dundee* (2), the Court of Admiralty, when it seized the ship, could enforce a full remedy affecting all the property of every kind belonging to the owners, however small the value of the ship seized might be. These cases were not cited by Brett L.J., but they seem to me strong authorities in favour of the view he took of the Admiralty procedure.

In this case, as in most others, both parties appeared, and both made claims. And the great question was whether both, or only one, and if so which, of the vessels was to blame. It was ultimately decided that both were to blame, and then the Court pronounced the judgment which, since the decision of this House in *Hay* v. *Le Neve* (3), has always been pronounced in such cases, viz., that the collision in question in the cause was occasioned by the fault or default of the master and crew of the Khedive, and by the fault or default of the master and crew of the Voorwaarts, and that the damage arising therefrom ought to be borne equally by the owners of the Khedive and the owners of the Voorwaarts. I say that this has always been the form of the judgment since *Hay* v. *Le Neve* (3). I do not think that such could have been the form of the judgment before that case, for it would have had an important bearing on the question then in issue, and not only was Lord Gifford, who presided, a very accurate lawyer, but it appears from the report that he consulted Lord Stowell, who

(1) 7 Moore's P. C. 284. (2) 1 Hagg. Adm. 120.
(3) 2 Shaw Sc. App. 395.

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furnished him with authorities, and would certainly have quoted the form of the judgment if it had then existed.

Before the decision in *Hay* v. *Le Neve* (1), Lord Stowell had, in *The Woodrop* (2), laid down that, when both ships were to blame, "the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them." As the Woodrop was solely to blame, he had no occasion to say on what principle it was to be apportioned. In *The Lord Melville*, a case not reported anywhere as far as I can find, but cited by Lord Gifford (3) from a shorthand note of the judgment furnished to him, Sir W. Scott said, "The ancient rule of the Admiralty was, that it should be considered a common loss to which they were justly liable." I do not doubt that "justly" is a misprint for "jointly."

The Court of Session had in *Hay* v. *Le Neve* (1) apportioned the damage by making the ship most to blame bear two-thirds of it, and the ship least to blame one-third. And the question before the House was, if this was right. In that case only one of the ships had put in a claim, and there was no cross claim, why I do not know, but the House had not to consider any question arising from the absence of a cross-claim.

Lord Gifford consulted Lord Stowell and was furnished by him with a note of a decision of Sir J. Marriott. That was in a case in which the Petersfield and the Judith Randolph had come in collision, and both were to blame, but the Judith Randolph most, and in which, I do not quite understand how, the Judith Randolph had recovered 230*l.* damages against the Petersfield. The decision of Sir J. Marriott was, "that the whole damage sustained by the Petersfield and her cargo, as well as the £230 damages and expenses given against the ship Petersfield, and the costs on both sides, be borne equally by the parties in this suit." (I may observe that Lord Stowell introduced a rule that though the damages were to be divided, each party should in such cases bear his own costs. And that it has been determined that the liability of the shipowner to make good costs is in no way affected by the statutes limiting his liability: see *Ex parte Rayne* (4)). On these autho-

(1) 2 Shaw Sc. App. 395.
(2) 2 Dod. 85.
(3) 2 Shaw Sc. App. 402.
(4) 1 Q. B. 982.

rities the decision of the House of Lords was that the damages arising from the collision ought to be borne equally by the owners of the two ships in fault.

I do not think attention was called to the effect which this might have on the interest of the innocent owners of cargo. In the possible event of one set of owners proving insolvent whilst the others were solvent, the owners of cargo would, if the rule was, as laid down in *The Lord Melville* (1), "that the owners were liable jointly," receive full indemnification for his loss from the solvent owners; by the rule as laid down in *Hay* v. *Le Neve* (2) he only gets one half from them, and gets a dividend only from the insolvent owners. This rule has been stigmatised as "judicium rusticorum," and is justified on the ground of general expediency, avoiding interminable litigation at the cost of some inevitable injustice in particular cases. But if the recompense in damages, which the one ship is to make to the other, is to be considered as quite a distinct thing from that which the other is to make to it, this injustice is increased in a manner which is not only not inevitable, but which, as it seems to me, it requires some subtle and technical reasoning to bring about.

It was not disputed that in practice, when the damages were ascertained, and it proved that the damage to one ship was greater than that to the other, the balance, and the balance only, was paid. The Master of the Rolls, in *Chapman* v. *Royal Netherlands Steam Navigation Company* (3), said that balance was "all that is ever recovered in the action. That is the substance of it." He had just before said that "the monition finally issues for the balance." Inquiry has been made, and it turns out that the parties to collision suits having always given substantial bail, there is no instance to be found in which a monition ever issued at all, the money being always paid without anything in the nature of an execution. But I think it can be hardly doubtful that, if in any case it ever should be necessary to issue a monition, it would not be issued for more than the balance.

Had the statute of 53 Geo. 3 c. 159 been unrepealed, and had the Master of the Rolls been exercising the jurisdiction given in

(1) 2 Shaw, Sc. App. 402. (2) 2 Shaw, Sc. App. 395.
(3) 4 P. D. 160.

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such wide terms by the 7th section, to determine "according to the rules of equity, and as the case may require," and by the 10th section "generally to do therein as shall appear to be just," I do not think that there could be much doubt that he did right in making his order according to the substance of what was done. I have already expressed my opinion that the statute now in force, though couched in different words, is to be construed as giving the same power as was given by the repealed Act.

The very ingenious argument of the counsel for the respondents was I think, this: There was from very early times a jurisdiction exercised by the Courts of Common Law, and I presume by all superior Courts, to prevent their process being abused, or used for the purposes of oppression. And therefore when A. had obtained a judgment in one Court against B., on which he was about to issue execution for the full amount, the Court, on its being brought to their notice by B., that he had obtained a judgment against A., either in the same Court or another, on which he could issue execution against A., would restrain A. from issuing execution on the judgment in their Courts, except on the terms that he consented to set the one against the other and would issue execution only for the balance. There were differences of practice in the Queen's Bench and in the Common Pleas at one time, as to the extent to which the interests of the attorneys were considered (see *Hall* v. *Ody* (1)), but those I need not notice. And it was argued with great ingenuity that the cross claims of the two ships which had come into collision were as distinct as any two actions in different Courts, and that the undenied practice merely arose from the Admiralty interfering to prevent the abuse of its process. Even if this were made out, I should be unwilling to give effect to what I cannot but think very technical and artificial reasoning.

But I do not think it is made out. The two claims arise out of one and the same accident. They are determined in one and the same Court, and they depend on one and the same question, viz. were both, or only one, of the parties to blame? and that question is determined once for all between the same parties. And the amount of the damages is also determined by the same Court and

(1) 2 B. & P. 28.

between the same parties. Even if the course of pleading had always been, as it appears latterly to have been, to condemn each separately, and order the damages to be assessed separately, I should still say that they were, in substance at least, not distinct and separate actions. But, as I have pointed out, I think there can have been no settled forms before *Hay* v. *Le Neve* (1). I think the forms produced were all comparatively modern. No practical consequences resulted from these forms, and consequently nothing called upon the Courts to consider to what consequences they led. In the case in 3 Wm. Robinson 38, where the Seringapatam and the Harriet had come in collision, and the owners of the Harriet, which had gone to the bottom, refused to give bail in the action against them by the Seringapatam, Dr. Lushington decided, I cannot but think erroneously, that he had no power to stay the action by the owners of the Harriet till they gave bail in the action against them. Whether he was right or not, is not since 24 Vict. c. 10 material, but he so thought, and that looks as if he thought them distinct actions. But when the Seringapatam dropped its action against the Harriet, and the Harriet proceeded against the Seringapatam, and finally judgment was given that both were to blame, and that judgment was affirmed on appeal, the question was raised in a very practical shape. The counsel for the owners of the Harriet argued "that the Court of Appeal had in effect, though not in express terms, said that the owners of the Harriet shall receive a clear moiety of the damage." Dr. Lushington took a course which could not be justified on the ground that the Court was preventing an abuse of its process, or any other ground than that taken by the Master of the Rolls in *Chapman* v. *Royal Netherlands Company* (2), that they were not independent actions, and that the substance was that the balance only should be paid.

I have only to add that, whilst I think that the Chancery Division in *Chapman* v. *Royal Netherlands Company* (2) and the Admiralty Division in the present case are to conduct the limitation action brought under 17 & 18 Vict. c. 104 s. 514, according to the procedure as altered by the various subsequent Acts, those Acts make no difference in the substance of what they are to do.

(1) 2 Shaw, Sc. App. 395. (2) 4 P. D. 160.

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They ought to make exactly the same declarations and do the same things which the Court of Session, following their own procedure, ought to have done if the limitation action had been brought in that Court.

I began by saying what was the question intended to be raised in this House. I doubt if it is raised. I doubt if the appeal is not premature. But I do not think that your Lordships should on that account refrain from deciding it. If the House adopts the view which I take of the law, I think the proper order would be to adopt that of the Master of the Rolls (1), and declare "that the defendants the owners of the Voorwaarts are entitled to prove for the moiety of the loss and damage sustained by them, less a moiety of the damage sustained by the steamship Khedive, and to be paid in respect of such balance pari passu with the other claimants out of the fund in Court," and with that declaration to remit the action to the Admiralty Division to do what is just in the action.

Since this was sent to the printers, I have had the opportunity of perusing the opinion of Lord Bramwell, who takes the opposite view. I have read it very attentively; I hope not in a controversial spirit, but with a real wish to correct my error, if it was one. But it has not changed my opinion.

There may well be cases in which one ship sues in one country and the other in another. *The Bold Buccleuch* (2) already cited was such a case, but such is not the ordinary case. And it is quite possible that the Courts of the two countries may come to different conclusions of fact, as to the culpability of the two ships or as to the amount of the damage. And when a limitation of liability suit is brought in a case where this unusual course has been taken, the Court may have difficult questions to solve. But "ad ea quæ frequentius accidunt jura adaptantur," and if your Lordships come to the conclusion to which I have come, that this, the ordinary case, ought to be dealt with in the way I propose, I think you will probably agree that it is better to leave the difficult questions which may arise in extraordinary cases to be solved, when, if ever, they arise.

(1) 4 P. D. 165.

(2) 7 Moore's P. C. 284.

LORD WATSON:—

My Lords, I have only to state my entire concurrence in the judgments which have just been delivered.

LORD BRAMWELL:—

My Lords, I entirely agree that the question is what was the practice, or what is the practice, or law, of the Court of Admiralty in proceedings in that Court when both ships are held to be to blame. If I had to form my own opinion upon that matter, unassisted and unbiassed by the opinions of my noble and learned friends who have addressed your Lordships, I confess that I should have come to a different conclusion from that to which they have come; because I should, upon an examination of the practice, and what I may call the necessity of the case, have come to the conclusion that there were separate decrees in each case for the damages, or a moiety of the damages, sustained by each ship, and that the fact that the balance was afterwards ascertained was a mere matter of arrangement and convenience for the avoidance of circuity of proceeding, that is to say, a payment by one ship and repayment by the other. And it seems to me extremely difficult to say that that must not of necessity be the law; because, what is to happen if proceedings are brought by the owners of one ship in one Court, and by the owners of the other ship in another Court in another country? I cannot see what is to happen in such a case as that; and I can foresee great difficulties from the opinions which have just been expressed, in the case of actions which may be brought in the Common Law Courts in this country.

I must acknowledge that I had written a long judgment in support of the views which I am now expressing, but it is not my intention to trouble your Lordships with it, for I really have not confidence enough in my own opinion in a matter of this description, to differ from the opinions which have been expressed by my noble and learned friends who have already addressed your Lordships. It is not a question of principle; it is not a question of reason; it is a question of what was the law of the Court of Admiralty; because undoubtedly what was the law formerly is the law still, for the Judicature Act has not changed the law in that respect. I therefore will not trouble your Lordships with

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the opinion which I should have expressed, for I feel bound to give up my own judgment in a case of this description, yielding to the opinions of my noble and learned friends (1).

(1) The Reporter is permitted to publish Lord Bramwell's printed opinion, which was as follows:—

My Lords, I will address myself to what I must call the substantial question in the case before your Lordships. The Peninsular and Oriental Company, whom I will call the Khedive owners, bring into Court £8 per ton of the Khedive, and apply to the Court that all suits and proceedings against them may be stayed. They say (but it is immaterial, for their prayer would be the same if it were otherwise, and the blame were all theirs) that the collision that took place was the result of the negligence of their ship's crew, and of the negligence of the Voorwaarts crew, and they offer the sum paid into Court for division among the Voorwaarts and Khedive owners. They say nothing about the damage to the Khedive. They only ask that proceedings against them may be stayed, and that they may not be "answerable in damages" beyond the sum they have so brought into Court. Inasmuch, however, as they, the Khedive owners, have in a suit against them by the Voorwaarts owners made a counter-claim for damage sustained by the Khedive, they, the Khedive owners, pray that the suit so far as relates to that counter-claim shall not be stayed. It seems clear to me that this last matter may be left out of consideration. Because it might well have been that they, the Khedive owners, had taken this limitation proceeding, before any proceeding by the Voorwaarts owners, or if not, at all events before any defence made by them or counter-claim set up. Substantially, then, all we need attend to is their prayer that proceedings against them may be stayed. They would not ask to be at liberty to pursue their claim, but that having pleaded it as a counter-claim they cannot ask for *all* proceedings in the Voorwaarts owners' action to be stayed, but only those which are against them, the Khedive. But for this they need not have mentioned their claim, but would have been able to enforce it, if valid, without any permission. Now, the Voorwaarts owners, on the other hand, say that they do not ask to make the Khedive owners "answer in damages" beyond the £8 a ton. But what they say is, Our damages are less than the sum at which you, the Khedive owners, put them. It is a strange thing to find those who have to receive damages contending that they are less than what those who have to pay them contend they are, and it is strange that the latter should so contend. But so it is in this case. It is manifest, therefore, that what the Khedive owners have asked, if put with precision, is, that they shall not be answerable in damages beyond £8 a ton, and, that in order that they may not be, they shall be at liberty to pursue their remedies for the damage their ship has sustained. While, what the Voorwaarts owners have asked is, not in terms that Khedive owners shall be answerable in damages beyond the £8 a ton, but that they, the Khedive owners, shall not be allowed to recover damages for the injury their ship has sustained, because, in truth, the Khedive owners have sustained no damage, no recoverable damage, by the collision, inasmuch as the amount or value of the injury is less than the amount or value of the injury to the Voorwaarts. In

LORD SELBORNE L.C. then moved the order set out below, and proceeded thus:—

It will be for your Lordships to consider what ought to be done

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other words, the Voorwaarts owners say that when damages to two ships happen from their joint negligence the thing to be ascertained is, what is the balance after deducting the smaller injury from the larger. Half of that is to be paid by the vessel which has sustained the smaller. This the Khedive owners deny, and this is the question before your Lordships. It is certain that the contention of the Voorwaarts owners does make the Khedive owners losers by the collision to a greater extent than £8 a ton. For they lose that, and they lose the right to recover compensation for the injury they have sustained. And the effect of it is that the Khedive owners are not to have the benefit of the statute unless they give up their claim to damages. Now I say again let us consider the substance of this question. Is it or is it not true that the Admiralty Courts have ever in any case laid down that they had to ascertain the amounts or values of the two injuries, and give judgment for and enforce payment of half the balance? Is it not certain that in no case have they done so? Have they not always ascertained the damage of the original complaining party and the damage of the other party, if he thought fit to prefer a claim for it, and only interfered to prevent either party issuing execution for his damages without allowing the damages of the other side; restraining, therefore, all execution by the one which has sustained the smaller damage, and execution for more than the balance by that which has sustained the greater? I submit with confidence not only that that is so, but that it must be so. For suppose that vessel which sustained the smaller damage or even the larger, and if the one sustaining the smaller sued, did not choose to appear, or appearing did not bring a cross suit or set up a counter-claim, is it not manifest that the Court *must* ascertain the damage sustained by the plaintiff without regard to that sustained by the other, and give judgment and execution accordingly? I do not put an impossible nor, I should think, an improbable case. Suppose one ship British, and the other foreign, and the first suit being in England by the British ship, the foreign preferred a foreign tribunal; or the first suit being by the foreigner abroad, the British preferred the British tribunal; or, suppose one ship sued in the Admiralty Division, the other in the Queen's Bench Division, and neither pleaded counter-claim; or, suppose one ship had released the other. To my mind these considerations demonstrate that each ship *recovers* half its own damage, and that the ascertainment of the balance (which may not at all times be possible), is only important with reference to the execution. No case is opposed to this; on the contrary, the case of *The Seringapatam* (3 Wm. Rob. 38) is clearly in support of it. For if the law were not as I say, Dr. Lushington's difficulty never could have arisen. For he would have said to the foreign plaintiff, I cannot give you judgment till the injury to the other ship is ascertained, and, therefore, till you appear and assist in that ascertainment your proceedings stay themselves. I submit that this was the law before the Judicature Act, and, there-

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with regard to the costs in the Court below and here. The case comes before the House, not under the ordinary circumstances

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fore, must be the law now. That Act, except in certain specified cases, was not intended to alter or affect the substantial rights of parties. It was a *Judicature* Act.

But this question may arise in the Queen's Bench or Chancery. Ship A brings its action for damage in the Queen's Bench Division, contending or not contending that the defendant, ship B, is alone to blame. Ship B defends, and does or does not counterclaim. The action is tried before a jury. They find both ships to blame. It is that, if they find both to blame, ship A is entitled to its damage (36 & 37 Vict. c. 66, s. 25, sub-s. 9). What is to happen? Is the jury to assess both damages, and give a verdict for the balance, and that though there is no counter-claim? or what? It is true that the sub-section says the rules hitherto in force in the Court of Admiralty shall prevail, but that must mean as to the right to damages. That this is so is shewn by the other words, "so far as they have been at variance with the rules in force in the Courts of common law." It cannot have been intended by this section to cause a jury so to ascertain the balance.

Justice and hardship have been spoken of. I think no question of either arises, except, perhaps, as I shall presently mention. The law makes a shipowner, wholly blameless himself, liable for the negligence of his crew. Whether he should be or not, as a matter of expediency, has been questioned. The legislature, at all events, has said that he shall not be, beyond a sum equal to £8 a ton of his ship. This the shipowner knows, and builds and sails his ship with that knowledge, and with the knowledge that his rights against other shipowners are limited in like way. Having that knowledge, he has no right to complain that he is made liable to that extent, and no right to complain that the liability of others to him is limited in like way. I may observe that there is no limitation of the liability of the actual wrongdoer, whether owner or captain, or other. But I may point out to your Lordships some consequences of the plaintiff's contention which seem to me unreasonable. Ships A and B collide, and both are to blame, each damaged £5000; cargo of A damaged £10,000; ship B worth, at £8 a ton, £5000. On the contention of the Voorwaarts owners, cargo of A is paid its half in full, i.e., £5000; A and B each get nothing. Whereas, if B had not been injured, ship A would receive £1666 13*s.* 4*d.*, and cargo of A £3333 6*s.* 8*d.*, or 13*s.* 4*d.* in the pound. Why? It is true that, if we suppose ship B injured £5000, and at liberty to enforce its claim for half against ship A, it would receive from A £2500, while A would receive out of the £5000 paid into court only £1666 13*s.* 4*d.* But that would be so much the better than receiving nothing, and there is this to be said, that the whole damage sustained by everybody is more evenly distributed. It may be that this shews there is an injustice or hardship in the contention of the Voorwaarts owners. Again, suppose each ship worth, at £8 a ton, £5000, and damaged £5000, and the cargo of each damaged £12,000, each pays into Court £5000. If the law is as the Voorwaarts owners say, each ship gets nothing, while the cargo owners of each ship divide the

which make it fit to apply the rule that the costs should follow the event, but under these circumstances; that in *Chapman* v. *The Royal Netherlands Steam Navigation Company* (1), between other parties, a decision had been pronounced by the Court of Appeal reversing the judgment of the Master of the Rolls, which decision it was necessary for the Court below to follow, until reversed by this House. The point also was one which your Lordships felt to

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sum paid in by the other ship, and get 16*s.* 4*d.* in the pound; while if the law is as the Khedive owners say, each ship and each cargo gets about 11*s.* 9*d.* in the pound. I cannot see why this should not be. It may be that these considerations show a hardship and injustice on ships generally if the Voorwaarts' contention is right, and that substantially they are answerable in damages beyond the value of £8 per ton. Again, let us suppose the Voorwaarts not damaged, or but little damaged, but her cargo beyond £8 a ton. The Khedive owners would recover then against the Voorwaarts owners damages. Why should they not now, leaving the Voorwaarts owners to their claim on the sum paid in? As was pointed out by Baggallay L.J. if the contention of the Voorwaarts owners is right, they will be as well off as if their ship was blameless. I submit to your Lordships that the reason and convenience of the thing are in favour of the contention of the Khedive owners, that a decision in their favour is in furtherance of the general intention of the Legislature in limiting shipowners' liability; that a decision against them would make them losers by the collision to a greater amount than £8 a ton, and indirectly answerable in damages to a greater amount, for they would lose the £8 a ton, and lose the right to recover damages. The Master of the Rolls, in his judgment in *Chapman* v. *Royal Netherlands Steam Navigation Co.* (4 P. D. 160), assumes that "one or the other (ship) can recover damages, and only one of the two." This, with great deference, I deny, for the reasons I have given. He says also (p. 163) that the shipowner paying the £8 per ton into Court is "to get no profit." He does not, for a profit, but that he may not have a loss, viz., the giving up of his right to damages for the injury done his ship. The judgment of Brett L.J. contains a short statement of the practice of the Admiralty Court, but concludes that what takes place is the ascertainment of a balance, and that judgment is given for that. To this I cannot agree. I cannot agree with what Brett L.J. says (p. 185), "In the present case it is not to be applied until the balance which would otherwise be payable to the owners of the Vesuvius is ascertained." I agree with the judgments of Baggallay and Cotton L.JJ., especially the reasoning of Baggallay L.J. (p. 170), as to the loss to the Khedive owners that will follow if this judgment is reversed, and especially the reasoning of Cotton L.J. as to the nature of the Admiralty proceedings, in which I entirely concur. I think that this judgment should be affirmed.

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(1) 4 P. D. 157.

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be one of difficulty, involving an abstruse matter of law. Taking all these circumstances into account, and quite consistently, as it seems to me, with the principle of the rule, I submit to your Lordships that no costs should be given either in the Court of Appeal or in this House.

Order appealed from reversed; judgment of the Admiralty Division dated 5th April 1881 *affirmed, with the following declaration; that the defendants, the owners of the steam vessel* Voorwaarts, *are entitled to prove against the fund paid into Court under that judgment for a moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the steam vessel* Khedive, *and to be paid in respect of the balance due to them after such deduction, pari passu with the other claimants out of such fund. Cause remitted to the Admiralty Division to do therein as shall be just and consistent with this declaration and judgment.*

Lords' Journals 26th July 1882.

Solicitors for appellants: *Clarkson, Greenwell, & Wyles.*
Solicitors for respondents: *Freshfields & Williams.*

[PRIVY COUNCIL.]

CHARLES RUSSELL . . . . . APPELLANT; J. C.*

AND 1882

THE QUEEN ON THE INFORMATION OF JOHN WOODWARD . . . . . RESPONDENT. *May* 2, 3; *June* 23.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF NEW BRUNSWICK.

British North America Act, ss. 91, 92, *sub-ss.* 9, 13, 16—*Legislative Powers of the Dominion Parliament—Validity of Canada Temperance Act*, 1878.

Held, that the Canada Temperance Act, 1878, which in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors except in wholesale quantities or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, punishable by fine and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament.

The objects and scope of the Act are general, viz., to promote temperance by means of a uniform law throughout the Dominion. They relate to the peace, order, and good government of Canada, and not to the class of subjects "property and civil rights." Provision for the special application of the Act to particular places does not alter its character as general legislation.

APPEAL from a judgment of the Supreme Court given in Hilary Term 44 Vict. discharging a rule nisi granted by the said Court upon the application of the respondent for a writ of certiorari to remove into the said Court a certain conviction made by John L. Marsh, Esq., the police magistrate of the city of Frederickton, within the province, against the respondent for unlawfully selling, bartering, and disposing of intoxicating liquors contrary to the second part of the Canada Temperance Act, 1878.

The question raised in this appeal was as to the validity of the said Act. The Supreme Court followed the decision of the Supreme Court of Canada in the case of *City of Frederickton* v. *The Queen* (1), which upheld the validity of the Act, reversing

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, and SIR RICHARD COUCH.

(1) 3 Supreme Court of Canada Rep. p. 505.

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a decision of the New Brunswick Supreme Court which declared its invalidity as being ultra vires the Dominion Parliament.

Benjamin, Q.C., and *Reginald Brown*, for the appellant, contended that the Dominion Parliament had no power to pass the Act in question: see *Citizens Insurance Company* v. *Parsons* (1), according to which it is not necessary to shew that the Act comes exclusively within sect. 91 of the British North America Act, 1867, for the two sections may be read together. Reference was made to sects. 91 and 92, sub-sects. 9, 13, 16, to sects. 94 and 121. The rules laid down in *Parsons' Case* are that it must be ascertained (1) whether the subject comes within any of the classes enumerated under sect. 92; (2) if so, does it also come within any of the classes enumerated under sect. 91; (3) if it is within both, is the power of the provincial Legislature overborne by the power of the Dominion Parliament. Up to the time of the passing of the Act of 1867 the Legislatures of the several provinces had always exercised the power of dealing with the sale of liquors within their provinces, and with the granting of licenses for the purposes of local revenue. They distributed the right of granting such licenses amongst the various municipalities for purely local purposes: see New Brunswick Acts, 11 Vict. c. 61, s. 59; 17 Vict. c. 15, s. 21; 22 Vict. c. 8, s. 74; 36 Vict. c. 10, s. 32. All provided fees for licenses. Under the provincial Acts prior to 1867 the municipalities had a revenue, the power of legislating with regard to which is preserved to the Provincial Legislatures by sub-sect. 9 of sect. 92. These licensing powers were continued in the municipalities by sect. 29 of 39 Vict. c. 105 (Consolidated Statutes of New Brunswick, 1876), and were in force up to the 1st of May, 1879. The local Legislatures had exclusive power to raise money by licenses, and the Dominion cannot interfere therewith by legislating with regard to the commodities which are the subject of licenses. The Legislature having treated this as a local matter, can the Courts say that it is not? This is a law in relation to licenses of a local nature; if a criminal law it comes under sub-sect. 15 of sect. 92. It is not a law for the peace, order, and good government of Canada, for it is a law relating to a locality. If it applied to the whole Dominion without local

(1) 7 App. Cas. 96, 107.

option it would then be within the power of the Dominion Parliament. Reference was made to *Keep* v. *M'Lellan*, decided 12th December, 1876 (1), and *L'Union St. Jacques de Montréal* v. *Bélisle* (2). Even if the Dominion Parliament possessed the powers which it assumed to exercise by this Act, it had no power to delegate them and to give local authorities the right to say whether the provisions of the Act should be operative or not.

[SIR MONTAGUE E. SMITH :—Their Lordships do not require to hear the respondent's counsel in reference to sub-sects. 9 and 13, but only in regard to sub-sect. 16.]

Maclaren, Q.C., and *Fullarton*, for the respondent :—

The words "matters of a merely local or private nature in the province" mean matters the interest or effect of which does not transcend the locality or the private person. If a matter can only affect the particular locality directly or indirectly then it is left to local legislation. If, on the other hand, such private or local matter falls within any of the subjects enumerated in sect. 91, provincial legislation cannot deal with it. Drunkenness affects the whole community, its character, health, and efficiency, more than any other matter; and giving local option does not render the Act which deals with such a matter local in its nature. On the contrary, local option is usually given where the subject is of great general interest, opinion divided as to the change, and large interests threatened thereby. This is the case here. One test whether a matter is "merely" (a restrictive word) local or private is the magnitude of the interests involved, such as temperance, education, public rights, health, &c. Reference was made to the Quebec Resolutions (No. 45), which are referred to in the preamble of the Act of 1867 as the foundation of the Act: see Doutré's Constitution of Canada, Appendix, p. 389. The Regulation No. 45 is given effect to by the words in sect. 91: "Notwithstanding anything in this Act," &c., &c. Reference was then made to *The Queen* v. *Justices of Kings* (3); *The Queen* v. *Taylor* (4); *Cooey* v. *Municipality of the Corporation of Brome* (5); *Hart et la Corpora-*

(1) 2 Russ. & Chesky, Supreme Court Nova Scotia Rep. p. 5.
(2) Law Rep. 6 P. C. 31.
(3) 2 Pugs. 535.
(4) 36 Up. Can. Q. B. Rep. p. 218.
(5) 21 Low. Can. Jur. 183.

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tion du Comté de Missisquoi (1); *Poitras* v. *Corporation of Quebec* (2); *The Queen* v. *Boardman* (*Ontario*) (3). The condition annexed to the legislation involved in giving local option does not imply any delegation of legislative power: *The Queen* v. *Burah* (4).

Further, the case comes within the words "regulation of trade and commerce" in sect. 91, sub-sect. 2. The Act, moreover, is a criminal statute, creating a new offence, the whole tenor being of a criminal nature: see 31 Vict. c. 1 (Interpretation Act), s. 7, sub-sect. 20 (Canada) making this offence a misdemeanour. It is therefore within sect. 91, sub-sect. 27. [SIR JAMES HANNEN:—If, the subject-matter be purely provincial could the Dominion Parliament take possession of it by making it criminal?] The following are instances of Acts originally of merely municipal character, but since the British North America Act, 1867, dealt with by Dominion legislation: cf. 32 & 33 Vict. c. 28, c. 27, and c. 22, ss. 25, 26, as respectively affecting 29 & 30 Vict. c. 51 (Canada), s. 284, sub-ss. 8, 9; s. 269, sub-s. 5, and sub-ss. 13, 14.

Brown, replied.

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from an order of the Supreme Court of the Province of New Brunswick, discharging a rule nisi which had been granted on the application of the Appellant for a certiorari to remove a conviction made by the police magistrate of the city of Frederickton against him, for unlawfully selling intoxicating liquors, contrary to the provisions of the Canada Temperance Act, 1878.

No question has been raised as to the sufficiency of the conviction, supposing the above-mentioned statute is a valid legislative Act of the Parliament of Canada. The only objection made to the conviction in the Supreme Court of New Brunswick, and in the appeal to Her Majesty in Council, is that, having regard to the provisions of the British North America Act, 1867, relating to the distribution of legislative powers, it was not competent for the Parliament of Canada to pass the Act in question.

(1) 2 Quebec L. R. 170.
(2) 9 Rev. Leg. 531.
(3) Doutré's Const. of Canada, p. 320.
(4) 3 App. Cas. 906.

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The Supreme Court of New Brunswick made the order now appealed from in deference to a judgment of the Supreme Court of Canada in the case of the *City of Frederickton* v. *The Queen*. In that case the question of the validity of the Canada Temperence Act, 1878, though in another shape, directly arose, and the Supreme Court of New Brunswick, consisting of six Judges, then decided, Mr. Justice Palmer dissenting, that the Act was beyond the competency of the Dominion Parliament. On the appeal of the City of Frederickton, this judgment was reversed by the Supreme Court of Canada, which held, Mr. Justice Henry dissenting, that the Act was valid. (The case is reported in 3rd Supreme Court of Canada Reports, p. 505.) The present appeal to Her Majesty is brought, in effect, to review the last-mentioned decision.

The preamble of the Act in question states that "it is very desirable to promote temperance in the dominion, and that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors." The Act is divided into three parts. The first relates to "proceedings for bringing the second part of this Act into force;" the second to "prohibition of traffic in intoxicating liquors;" and the third to "penalties and prosecutions for offences against the second part."

The mode of bringing the second part of the Act into force, stating it succinctly, is as follows: On a petition to the Governor in Council, signed by not less than one fourth in number of the electors of any county or city in the Dominion qualified to vote at the election of a member of the House of Commons, praying that the second part of the Act should be in force and take effect in such county or city, and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General, after certain prescribed notices and evidence, may issue a proclamation, embodying such petition, with a view to a poll of the electors being taken for or against its adoption. When any petition has been adopted by the electors of the county or city named in it, the Governor-General in Council may, after the expiration of sixty days from the day on which the petition was adopted, by Order in Council published in the *Gazette*, declare that the second part of the Act shall be in force and take effect in such county or city, and the same is then to become

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of force and take effect accordingly. Such Order in Council is not to be revoked for three years, and only on like petition and procedure.

The most important of the prohibitory enactments contained in the second part of the Act is s. 99, which enacts that, "from the day on which this part of this Act comes into force and takes effect in any county or city, and for so long thereafter as the same continues in force therein, no person, unless it be for exclusively sacramental or medicinal purposes, or for bonâ fide use in some art, trade, or manufacture, under the regulation contained in the fourth sub-section of this section, or as hereinafter authorized by one of the four next sub-sections of this section, shall, within such county or city, by himself, his clerk, servant, or agent, expose or keep for sale, or directly or indirectly, on any pretence or upon any device, sell or barter, or in consideration of the purchase of any other property give, to any other person, any spirituous or other intoxicating liquor, or any mixed liquor, capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating."

Sub-sect. 2 provides that "neither any license issued to any distiller or brewer" (and after enumerating other licenses), "nor yet any other description of license whatever, shall in any wise avail to render legal any act done in violation of this section."

Sub-sect. 3 provides for the sale of wine for sacramental purposes, and sub-sect. 4 for the sale of intoxicating liquors for medicinal and manufacturing purposes, these sales being made subject to prescribed conditions.

Other sub-sections provide that producers of cider, and distillers and brewers, may sell liquors of their own manufacture in certain quantities, which may be termed wholesale quantities, or for export, subject to prescribed conditions, and there are provisions of a like nature with respect to vine-growing companies and manufacturers of native wines.

The third part of the Act enacts (sect. 100) that whoever exposes for sale or sells intoxicating liquors in violation of the second part of the Act should be liable, on summary conviction, to a penalty of not less than fifty dollars for the first offence, and not less than one hundred dollars for the second offence, and to be imprisoned for a term not exceeding two months for the third and

every subsequent offence; all intoxicating liquors in respect to which any such offence has been committed to be forfeited.

The effect of the Act when brought into force in any county or town within the Dominion is, describing it generally, to prohibit the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors in violation of the prohibition and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment.

It was in the first place contended, though not very strongly relied on, by the Appellant's counsel, that assuming the Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of counties and cities. The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection. If authority on the point were necessary, it will be found in the case of the *Queen* v. *Burah* (1), lately before this Board.

The general question of the competency of the Dominion Parliament to pass the Act depends on the construction of the 91st and 92nd sections of the British North America Act, 1867, which are found in Part VI. of the statute under the heading, "Distribution of Legislative Powers."

The 91st section enacts, "It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons to make laws for the peace, order, and good govern-

(1) 3 App. Cas. 889.

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ment of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated;" then after the enumeration of twenty-nine classes of subjects, the section contains the following words: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislature of the province."

The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of sects. 91 and 92, and their relation to each other, were fully considered and commented on by this Board in the case of the *Citizens Insurance Company* v. *Parsons* (1). According to the principle of construction there pointed out, the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the Legislatures of the Provinces. If it does, then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in sect. 92, no further question will remain, for it cannot be contended, and indeed was not contended at their Lordships' bar, that, if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada had not, by its general power "to make laws for the peace, order, and good government of Canada," full legislative authority to pass it.

Three classes of subjects enumerated in sect. 92 were referred to, under each of which, it was contended by the appellant's counsel, the present legislation fell. These were:—

9. Shop, saloon, tavern, auctioneer, and other licenses in order

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to the raising of a revenue for provincial, local, or municipal purposes.

13. Property and civil rights in the province.

16. Generally all matters of a merely local or private nature in the province.

With regard to the first of these classes, No. 9, it is to be observed that the power of granting licenses is not assigned to the Provincial Legislatures for the purpose of regulating trade, but "in order to the raising of a revenue for provincial, local, or municipal purposes."

The Act in question is not a fiscal law; it is not a law for raising revenue; on the contrary, the effect of it may be to destroy or diminish revenue; indeed it was a main objection to the Act that in the city of Fredericton it did in point of fact diminish the sources of municipal revenue. It is evident, therefore, that the matter of the Act is not within the class of subject No. 9, and consequently that it could not have been passed by the Provincial Legislature by virtue of any authority conferred upon it by that sub-section.

It appears that by statutes of the province of New Brunswick authority has been conferred upon the municipality of Fredericton to raise money for municipal purposes by granting licenses of the nature of those described in No. 9 of sect. 92, and that licenses granted to taverns for the sale of intoxicating liquors were a profitable source of revenue to the municipality. It was contended by the appellant's counsel, and it was their main argument on this part of the case, that the Temperance Act interfered prejudicially with the traffic from which this revenue was derived, and thus invaded a subject assigned exclusively to the Provincial Legislature. But, supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion Parliament might not pass it by virtue of its general authority to make laws for the peace, order, and good government of Canada. Assuming that the matter of the Act does not fall within the class of subject described in No. 9, that sub-section can in no way interfere with the general authority of the Parliament to deal with that matter. If the argument of the appellant that the power given to the Provincial Legislatures to raise a revenue by licenses prevents the Dominion

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Parliament from legislating with regard to any article or commodity which was or might be covered by such licenses were to prevail, the consequence would be that laws which might be necessary for the public good or the public safety could not be enacted at all. Suppose it were deemed to be necessary or expedient for the national safety, or for political reasons, to prohibit the sale of arms, or the carrying of arms, it could not be contended that a Provincial Legislature would have authority, by virtue of sub-sect. 9 (which alone is now under discussion), to pass any such law, nor, if the appellant's argument were to prevail, would the Dominion Parliament be competent to pass it, since such a law would interfere prejudicially with the revenue derived from licenses granted under the authority of the Provincial Legislature for the sale or the carrying of arms. Their Lordships think that the right construction of the enactments does not lead to any such inconvenient consequence. It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under sub-sect. 9, is not in itself legislation upon or within the subject of that subsection, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion. It is to be observed that the express provision of the Act in question that no licenses shall avail to render legal any act done in violation of it, is only the expression, inserted probably from abundant caution, of what would be necessarily implied from the legislation itself assuming it to be valid.

Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects, "Property and Civil Rights." It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a

matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada. It was said in the course of the judgment of this Board in the case of the *Citizens Insurance Company of Canada* v. *Parsons* (1), that the two sections (91 and 92) must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and

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character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects "Property and Civil Rights" within the meaning of sub-sect. 13.

It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to sub-sect. 15 of sect. 92, viz., "The imposition of any punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects; but as far as they have yet gone, their Lordships fail to see that this has been done.

It was lastly contended that this Act fell within sub-sect. 16 of of sect. 92,—"Generally all matters of a merely local or personal nature in the province."

It was not, of course, contended for the appellant that the Legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion to take effect at the same time throughout the whole Dominion. Their Lordships understand the contention to be that, at least in the absence of a general law of the Parliament of Canada, the provinces might have passed a local law of a like kind, each for its own province, and that, as the prohibitory and penal parts of the Act in question were to come into force in those counties and cities only in which it was adopted in the manner prescribed, or, as it was said, "by local option," the legislation was in effect, and on its face, upon a matter of a merely local nature. The judgment of Allen, C.J., delivered in the Supreme Court of the Province of New Brunswick in the case of *Barker* v. *City of Fredericton* (1), which was adverse to the validity of the Act in question, appears to have been founded upon

(1) 3 Pugs. & Burb. Sup. Ct. New Br. Rep. 139.

this view of its enactments. The learned Chief Justice says:—"Had this Act prohibited the sale of liquor, instead of merely restricting and regulating it, I should have had no doubt about the power of the Parliament to pass such an Act; but I think an Act, which in effect authorizes the inhabitants of each town or parish to regulate the sale of liquor, and to direct for whom, for what purposes, and under what conditions spirituous liquors may be sold therein, deals with matters of a merely local nature, which, by the terms of the 16th sub-section of sect. 92 of the British North America Act, are within the exclusive control of the local Legislature."

Their Lordships cannot concur in this view. The declared object of Parliament in passing the Act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion. The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it. It is true that the prohibitory and penal parts of the Act are only to come into force in any county or city upon the adoption of a petition to that effect by a majority of electors, but this conditional application of these parts of the Act does not convert the Act itself into legislation in relation to a merely local matter. The objects and scope of the legislation are still general, viz., to promote temperance by means of a uniform law throughout the Dominion.

The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. It is therefore unnecessary to discuss the considerations

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which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localises the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle that a public officer should proclaim in what districts it should come in effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character.

Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in sect. 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges, who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, "the regulation of trade and commerce," enumerated in that section, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada.

In the result, their Lordships will humbly recommend Her Majesty to affirm the judgment of the Supreme Court of Canada, and with costs.

Solicitors for the appellant: *Linklaters, Hackwood, Addison, & Brown.*

Solicitors for the respondent: *Simpson, Hammond, & Co.*

END OF VOL. VII.